No. 17-5554	
Title:	**Denard Stokeling, Petitioner** **v.** **United States**
Docketed:	August 9, 2017
Linked with 16A1211	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(16-12951)
Decision Date:	April 6, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 06 2017	Application (16A1211) to extend the time to file a petition for a writ of certiorari from July 5, 2017 to August 4, 2017, submitted to Justice Thomas.
Jun 12 2017	Application (16A1211) granted by Justice Thomas extending the time to file until August 4, 2017.
Aug 04 2017	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 8, 2017)
Aug 16 2017	Waiver of right of respondent United States to respond filed.
Aug 24 2017	DISTRIBUTED for Conference of 9/25/2017.
Aug 29 2017	Supplemental brief of petitioner Denard Stokeling filed. (Distributed)
Aug 31 2017	Second supplemental brief of petitioner Denard Stokeling filed. (Distributed)
Sep 12 2017	Response Requested. (Due October 12, 2017)
Oct 04 2017	Order extending time to file response to petition to and including November 13, 2017.
Nov 08 2017	Order further extending time to file response to petition to and including December 13, 2017.

Dec 13 2017	Brief of respondent United States in opposition filed. **Proof of Service** **Main Document**
Dec 27 2017	Reply of petitioner Denard Stokeling filed. **Main Document** **Proof of Service**
Mar 01 2018	DISTRIBUTED for Conference of 3/16/2018.
Mar 07 2018	Third supplemental brief of petitioner Denard Stokeling filed. (Distributed) **Main Document** **Proof of Service**
Mar 19 2018	DISTRIBUTED for Conference of 3/23/2018.
Mar 19 2018	Fourth supplemental brief of petitioner Denard Stokeling filed. (Distributed) **Main Document** **Proof of Service**
Mar 26 2018	DISTRIBUTED for Conference of 3/29/2018.
Apr 02 2018	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Apr 24 2018	Motion to extend the time to file the briefs on the merits is granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 11, 2018. The time to file respondent's brief on the merits is extended to and including August 3, 2018.
Apr 24 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
Jun 11 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Jun 11 2018	Brief of petitioner Denard Stokeling filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Jun 18 2018	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 09 2018	SET FOR ARGUMENT On Tuesday, October 9, 2018
Aug 03 2018	CIRCULATED

Aug 03 2018	Brief of respondent United States filed. (Distributed) **Proof of Service** **Main Document**
Aug 07 2018	Record requested from the U.S.C.A. 11th Circuit.
Aug 07 2018	Record received from the U.S.D.C. Southern Dist. of FL. (Miami). The record is electronic.
Aug 14 2018	Record received from the U.S.D.C. Southern District of Florida. 1 envelope, the record is SEALED.
Sep 04 2018	Reply of petitioner Denard Stokeling filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Argued. For petitioner: Brenda G. Bryn, Ft. Lauderdale, Fla. For respondent: Frederick Liu, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

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NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)(an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Mo. Rev. Stat. § 570.010(13) 14

Mo. Rev. Stat. § 570.025(1) 14

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N.Y.Penal Law § 160.00(1) 14

Okla. Stat. tit. 21, § 791 14

Okla. Stat. tit. 21, § 792 14

Okla. Stat. tit. 21, § 793 14

Or. Rev. Stat. § 164.395(1)(a) 14

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Wis. Stat. § 943.32(1)(a) 14

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Joel Prentis Bishop,

Commentaries on the Criminal Law (2nd ed. 1858) 14, 17

William Blackstone,

Commentaries on the Laws of England (1st ed. 1765) 14-15

William Clark & William Marshall,

A Treatise on the Law of Crimes (2d ed. 1905) 16

Edward Coke,

Institutes of the Laws of England (1629) 15

Edward Hyde East,

Pleas of the Crown (2d ed. 1806) 15-16

Wayne R. LaFave,

Substantive Criminal Law (2d ed. 2016) 15, 17-18

William Odgers,

The Common Law of England (2d ed. 1920) 17

John Rood,

A Digest of Important Cases on the Law of Crimes (1906) 16

William Russell,

A Treatise on Crimes and Indictable Offenses (2d ed. 1828) 16

Charles Torcia,

Wharton's Criminal Law (15th ed. 2016) 17

IN THE
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OCTOBER TERM, 2017

No:

DENARD STOKELING,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Denard Stokeling respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion vacating Mr. Stokeling's non-ACCA sentence, and remanding for resentencing as an Armed Career Criminal, *United States v. Stokeling*, __ Fed. Appx. ___, 2017 WL 1279086 (11th Cir. April 6, 2017) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals vacating Mr. Stokeling's sentence was entered on April 6, 2017. Mr. Stokeling sought, and the Court granted, a 30-day extension of the time until August 4th for filing a petition for writ of certiorari. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

> **(e)(2)** As used in this subsection – . . .
>
> > **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that –
> >
> > > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another.

Fla. Stat. § 812.13. Robbery (1997)

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. ...
>
> (3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

STATEMENT OF THE CASE

The Charges and Plea

On October 20, 2015, a federal grand jury charged Denard Stokeling with being a previously convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §922(g)(1) and §924(e)(1). On March 2, 2016, Mr. Stokeling pled guilty to that charge.

The PSI and Sentencing

In the PSI, the Probation Officer opined that Mr. Stokeling was subject to enhanced sentencing as an Armed Career Criminal under 18 U.S.C. § 924(e) because three of his prior convictions were qualifying "violent felonies" or "serious drug offenses:" namely, his Sept. 27, 2997 conviction in Dkt. #F96-11220 for unarmed Florida robbery; his conviction on that same date in Dkt. #F97-14434 for armed robbery/home invasion/kidnapping; and his February 10, 19997 conviction in Dkt. #F97-1221 for sale/manufacture/delivery of cocaine.

Accordingly, the Probation Officer recommended that pursuant to U.S.S.G. § 4B1.4(b)(3)(B), his otherwise-applicable Chapter 2 offense level of 24 under § 2K2.1(a)(2), be increased to a level 33. With a 3-level reduction for acceptance of responsibility, his total recommended offense level was 30. And, at a Criminal History of V, his recommended advisory guideline range as an Armed Career Criminal was 180-188 months imprisonment.

Mr. Stokeling objected to the counting of both his robbery convictions as ACCA predicates, arguing that such convictions did not categorically require the

use of violent force. The government responded that they did, since in each case Mr. Stokeling was convicted after the Florida Supreme Court's decision in *Robinson v. State of Florida*, 692 So.2d 883 (1997) which had clarified that every robbery offense in Florida requires "resistance by victim that is overcome by the physical force of the offender."

At the August 28, 2016 sentencing, the district court granted the defense objection to the counting of his 1997 unarmed robbery conviction in Dkt. #96-11220 as an ACCA predicate, based upon the facts set forth in the PSI – which in the court's view "did not justify the enhancement." Without the ACCA enhancement, the court found that Mr. Stokeling's applicable Guideline range was 70-87 months imprisonment, and sentenced him to a term of 73 months imprisonment, followed by 2 years supervised release.

The Government's Appeal

The government appealed the district court's determination that Mr. Stokeling's 1997 unarmed robbery conviction was not an ACCA "violent felony," on two bases. First, it argued, the district court had impermissibly based that determination on whether the facts alleged in the PSI sounded "sufficiently violent," when this Court had repeatedly held that district courts are prohibited from basing the "violent felony" upon such judicial fact-finding. Second, the government argued, the 1997 unarmed robbery conviction categorically qualified as an ACCA violent felony pursuant to two prior Eleventh Circuit precedents: *United States v. Lockley*, 632 F.3d 1238, 1244-1245 (11th Cir. 2011), holding that a 2001 Florida robbery

conviction was categorically a "crime of violence" under the elements clause of the Guidelines, and *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), holding that a 1974 Florida armed robbery conviction qualified as a "violent felony" under the elements clause of the ACCA. The government emphasized, as it had below, that Mr. Stokeling was convicted after the Florida Supreme Court's decision in *Robinson* clarifying that the force used to commit a robbery offense in Florida must be enough to overcome "victim resistance."

Mr. Stokeling responded that the Court could and should affirm his sentence on any ground even if not considered by the district court, and specifically, here it should affirm for a number of reasons, including that it was clear from Florida law that overcoming victim resistance did not categorically require the type of "*violent* force" this Court had required in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). As support, he pointed out that in *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000), a Florida appellate court had affirmed a robbery conviction under Fla. Stat. § 812.13(1), where the State simply showed that the defendant had peeled back the victim's fingers before snatching money out of his hand. According to the *Sanders* court, the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed," and no more resistance, or "force," than that was necessary to uphold Sanders' strongarm robery conviction under § 812.13(1). *Id.* at 507. Mr. Stokeling also cited *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011), where another Florida appellate court had specifically rejected the defendant's argument

that actual "violence" was necessary for a robbery conviction in Florida, holding that the mere act of "engaging in a tug-of-war over the victim's purse" was sufficient for conviction. *Id.* at 323.

It was clear from these cases, Mr. Stokeling argued, that if the victim's resistance was itself slight, the "force" necessary to overcome it in Florida could also be slight. The *Curtis Johnson* level of "*violent* force" was not categorically necessary to overcome victim resistance, and seal a conviction, for Florida robbery. And therefore, under this Court's recent precedents clarifying the proper application of the categorical approach (*Descamps*, *Moncrieffe*, and *Mathis*), a conviction for that offense was not a qualifying ACCA predicate.

In reply, the government pointed out that the Eleventh Circuit had just decided *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016) in a fractured opinion, where the only point of agreement between the three panelmembers was that a Florida robbery conviction after the Florida Supreme Court's April 24, 1997 decision in *Robinson* was a categorically a "violent felony" within the ACCA's elements clause. Under *Seabrooks*, the government argued, Mr. Stokeling's 1997 conviction for unarmed robbery was clearly a "violent felony," and he should have been sentenced as an Armed Career Criminal. However, the government added, *Dowd* and *Lockley* were also "correct that all Florida robbery convictions, regardless of whether they were committed before or after *Robinson*, are violent felonies."

And notably, several weeks later, the Eleventh Circuit expressly so held in *United States v. Fritts*, 841 F.3d 937 (11th Cir. Nov. 8, 2016). *See id.* at 942-943

(holding "based on our precedent in *Dowd* and *Lockley*," and in light of the Florida Supreme Court's decision in *Robinson*, that a 1989 (pre-*Robinson*) armed robbery categorically qualifies as a violent felony under the ACCA's elements clause; *Robinson* reaffirmed that mere snatching – "without resistance by the victim and the use of physical force to overcome the victim's resistance" – did not constitute a robbery under § 812.13, and *Robinson* "tells us what that statute always meant").

On April 6, 2017, the Eleventh Circuit vacated Mr. Stokeling's sentence and remanded for resentencing as an Armed Career Criminal, due to the district court's improper fact-finding in making the "violent felony" determination, and because *Fritts* had held that "a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA]." *United States v. Stokeling*, ___ Fed. Appx. ___, 2017 WL 1279086 at *1 (11th Cir. April 6, 2017). According to the court, *Fritts* was clear that it was "bound" by *Lockley*'s holding that "Florida robbery is categorically a crime of violence under the elements of even the least culpable of the[] acts criminalized by Florida Statutes § 812.13(1)." *Stokeling, id.* at *1 (citing *Fritts*, 841 F.3d at 941). And, the court added, Stokeling "cannot circumvent this holding "even if he presents arguments the prior panel did not consider." *Stokeling, id.* (citing *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006)).[1] Relying on *Fritts*, the court held that the "force element" of Florida robbery satisfies the elements clause of the ACCA, because

[1] *Lockley*, notably, had not considered whether the robbery statute was divisible, what the least culpable act under the statute was according to Florida caselaw, or what level of force was necessary for a robbery "by force" (since the appellant in *Lockley* had focused his argument on a robbery by "putting in fear").

Robinson had clarified that the use of "force" "requires 'resistance by the victim that is overcome by the physical force of the offender.'" *Id.* at *2.

Judge Martin concurred, agreeing with the majority that Circuit precedent "dictates that Mr. Stokeling's prior robbery conviction under Fla. Stat. § 812.13 qualifies as a violent felony" under the ACCA," since he was convicted after the Florida Supreme Court's decision in *Robinson*. *Id.* at *2 (Martin, J., concurring) She wrote separately, however, to explain that she believed *Fritts* was wrongly decided, to the extent it held pre-*Robinson* Florida robbery convictions required the use of violent force. She acknowledged, however, that such a mistake "does not affect Mr. Stokeling." *Id.* at **2-5.[2]

Mr. Stokeling is currently set to be resentenced as an Armed Career Criminal on September 13, 2017.

[2] This Court denied certiorari in both *Seabrooks* and *Fritts* on June 19, 2017.

REASON FOR GRANTING THE WRIT

The Circuits are in conflict over whether a conviction for a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the ACCA, if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

The question of whether state robbery convictions necessarily have *violent* force "as an element" was not a pressing question for this Court when the ACCA's residual clause remained in existence. Many circuits, including the Eleventh, had easily concluded that the residual clause extended to categorically non-violent crimes due to the mere "risk" of physical injury during a robbery, or in its aftermath. In that vein, the Eleventh Circuit had held in *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), that even a robbery by "sudden snatching," a crime which – by definition – requires no more force than that necessary to snatch money or an item from the victim's hand, and neither victim resistance nor injury, was nonetheless a "violent felony" and proper ACCA predicate within the residual clause because "[s]udden snatching ordinarily involves substantial risk of physical injury to the victim." *Id.* at 1313.

Once this Court eliminated the residual clause as the easiest route to an ACCA enhancement in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015), however, lower courts have to reconsider whether state robbery crimes – long counted as "violent felonies" within the residual clause, or within the elements clause before this Court clarified the meaning of "physical force" as "*violent* force" in *Curtis Johnson v. United States*, 559 U.S. 133, 141 (2010), or the categorical

approach in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *Descamps v. United States*, 133 S.Ct. 2276 (2013): and *Mathis v. United States*, 136 S.Ct. 2243 (2016) – would qualify as "violent felonies" under these intervening precedents.

Some circuit courts have risen to that task. Unlike the Eleventh Circuit, they have carefully re-examined their prior elements clause robbery precedents; strictly applied the dictates of the now-clarified categorical approach; carefully conducted the now-mandated threshold "divisibility" inquiry, *Mathis*, 136 S.Ct. at 2256; sought out the state courts' interpretation of the elements of their robbery offenses as mandated by *Curtis Johnson*, 559 U.S. at 138, and *Mathis*, 136 S.Ct. at 2256; and determined the minimum conduct necessary for conviction as required by *Moncrieffe*, 133 S.Ct. at 1680. *See, e.g., United States v. Gardner*, 823 F.3d 793, 801-804 (4th Cir. 2016); *United States v. Winston*, 850 F.3d 677, 682-686 (4th Cir. 2017); *United States v. Parnell*, 818 F.3d 974, 978-981 (9th Cir. 2016); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016).

Notably, after conducting a proper analysis under the now-clarified categorical approach, at least one circuit – the Fourth in both *Gardner* and *Winston* – has concluded that two different common law robbery offenses, both of which require overcoming "victim resistance," do ***not*** categorically require the *Curtis Johnson* level of "*violent* force." 130 S.Ct. at 141 (defining "*violent* force" as "force capable of causing physical pain or injury to another person," which is "a substantial degree of force;" the word "violent" connotes "strong physical force"). *See Gardner*, 823 F.3d at 803 (North Carolina common law robbery "by violence"

does not qualify as an ACCA "violent felony" because it is clear from North Carolina caselaw that *de minimis* contact with the victim was sufficient for conviction, and the degree of force used was "immaterial"); *Winston*, 850 F.3d at 684-6855 (Virginia common law robbery by "violence" does not qualify as an ACCA "violent felony" because, as confirmed by Virginia appellate decisions, the minimum conduct sufficient to overcome resistance can be "slight;" thus, the offense does not require "violent force").

By contrast, the Eleventh Circuit – interpreting a statutory robbery offense based upon common law robbery, and which includes the same "resistance" element as the common law robbery offenses construed in the Fourth Circuit cases – has held (without reviewing ***any*** Florida appellate decisions) that simply ***because*** Florida robbery requires overcoming "victim resistance," the offense is categorically an ACCA violent felony. *See United States v. Seabrooks*, 839 F.3d 1326, 1340-1341, 1346, 1352 (11th Cir. 2016)(separate decisions by Hull, Baldock, and Martin, JJ.) (narrowly agreeing that Seabrooks' 1997 Florida robbery conviction was a "violent felony" according to *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) since Seabrooks' conviction post-dated the Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997) which clarified that a Florida robbery offense requires overcoming victim resistance); *United States v. Fritts*, 841 F.3d 937, 940-944 (11th Cir. 2016) (following not only *Lockley* but an even earlier "precedent," *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), to hold that all Florida robbery convictions, including those before *Robinson*, categorically qualify as ACCA

"violent felonies" since *Robinson* clarified what the Florida robbery statute "always meant").

In both *Seabrooks* and *Fritts*, the appellants informed the Court in their briefing that Florida caselaw made clear that overcoming "resistance" did not require violent force in every case. They urged the Eleventh Circuit, as Mr. Stokeling did here, to specifically consider decisions such as *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000) and *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011), which confirmed that *violent* force was not necessary to overcome resistance where the resistance itself was slight. Both Seabrooks and Fritts argued that the analysis in *Lockley* and *Dowd* had been abrogated by this Court's intervening precedents in *Descamps*, *Moncrieffe*, and *Mathis*.

Nevertheless, in *Seabrooks* the Eleventh Circuit reflexively adhered to its prior precedent in *Lockley*, ignoring the appellant's argument that *Lockley*'s analysis had not survived the Court's clarification of the categorical approach in *Moncrieffe*, *Descamps*, and *Mathis*. And thereafter in *Fritts*, the Eleventh Circuit not only followed *Lockley*, but *Dowd*, which had demonstrably misapplied the "modified categorical approach" and contained no other analysis. In *Seabrooks* and *Fritts*, as well as in the case below, the Eleventh Circuit has steadfastly refused to review ***any*** Florida caselaw – deferring completely to its prior precedents in *Lockley* and *Dowd* which preceded *Moncrieffe*, and did not consult Florida law to determine the least culpable conduct for conviction.

In this regard, the Tenth Circuit has aligned itself with the Eleventh Circuit. Indeed, in construing the offense of Colorado statutory robbery – which like Florida statutory robbery – is based upon common law robbery, the Tenth Circuit chose to defer to a dictionary definition of "violence" instead of surveying the relevant Colorado appellate caselaw to determine the least culpable conduct under the statute. *See United States v. Harris*, 844 F.3d 1260, 1266-1268 (10th Cir. 2017)(acknowledging that "Colorado remains committed to the common law definition of robbery," but finding Colorado statutory robbery remains an ACCA "violent felony" due to the Colorado Supreme Court's statement that "there can be no robbery without violence, and there can be no larceny with it;" finding the dictionary's definition of "violent" dispositive, rather than surveying the true meaning of "violence" according to Colorado appellate court decisions), *pet. for cert. filed* April 4, 2017 (No. 16-8616).

As such, the decisions of these three circuits are in direct conflict at this time.[3] For the following reasons, that conflict is intractable, untenable, and potentially far-reaching. It should be resolved by the Court forthwith.

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[3] Until June 17th of this year, the decisions of the Tenth and Eleventh Circuits also conflicted with the Eighth Circuit's decisions in *United States v. Bell*, 840 F.3d 963, 965-967 (8th Cir. 2016) (holding that Missouri second degree robbery was not a "crime of violence" under the Guidelines), and *United States v. Swopes*, 850 F.3d 979, 981 (8th Cir. 2017)(following *Bell* to conclude that such a crime was likewise not a "violent felony" under the ACCA). However, on June 17th, the Eighth Circuit vacated *Swopes* and set that case for rehearing en banc.

A. The common law roots of the "overcoming resistance" requirement

Florida, like the majority of states, permits a conviction for robbery based on the use of force so long as the degree of force used is sufficient to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Although at least fifteen states have now expressly included some variation of this standard in the text of their statutes,[1] many others (including Florida, North Carolina, Virginia, and Colorado) have judicially recognized an "overcoming resistance" element through their caselaw.[2]

Notably, this widely-applied requirement of "victim resistance" in state robbery offenses, has deep roots in the common law. Common law robbery had an element labeled "violence." *See* 2 Joel Prentis Bishop, *Commentaries on the Criminal Law* § 966 (2nd ed. 1858) (defining robbery as "larceny committed by violence"); 4 William Blackstone, *Commentaries on the Laws of England* 241 (1st ed. 1765) ("Larciny from the person is either by privately stealing; or by open and

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[1]*See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz. Rev. Stat. §§ 13-1901, 1902; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y.Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

[2]*See, e.g., Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1998); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth*, 462 S.E.2d 911, 913 (Va. 1995); *People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996); *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000).

violent assault, which is usually called robbery."); 3 Edward Coke, *Institutes of the Laws of England* 68 (1629) (explaining that robbery is a common law felony in which property is taken "by a violent assault"). It was sometimes said that robbery was a larceny committed "by violence *or* putting in fear." *E.g.*, 2 Edward Hyde East, *Pleas of the Crown* 707 (2d ed. 1806) (emphasis added). Although the "sudden taking of a thing unawares from the person," without more, did not involve "violence" and so was mere larceny, not robbery, *id.* at 708, as LaFave has noted, the difference between the two offenses was, in reality, a "fine distinction[]"; "[t]he line between robbery and larceny from the person (between violence and lack of violence)" was "not always easy to draw." 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3 (2d ed. 2016).

Nonetheless, the term "violence" did ***not*** imply a "substantial degree of force" at common law. *See Mahoney v. People*, 48 How. Pr. 185, 189 (N.Y. 1874) ("it is not the extent and degree of force which make the crime, but the success thereof.") *see also State v. Parsons*, 87 P. 349, 351 (Wash. 1906) ("[T]he degree of force used was *immaterial* as long as it was sufficient to compel the prosecuting witness to part with his property.")(Emphasis added).

The law d[id] not require that one be beaten before he submitted to the robbery to constitute the offense." *Gordon v. State*, 187 S.W. 913, 915 (Ark. 1916). No bodily injury or threat of bodily injury was necessary. Rather, it was "sufficient that so much force ... be used as might ... oblige a man to part with his property without or against his consent." 4 Blackstone, *Commentaries* 242.

As such, two recurring fact patterns defined the boundaries of "violence" for purposes of common law robbery.

First, any "struggle for possession of the property" between the criminal and the victim constituted "violence" sufficient to render the taking a robbery. 2 East, *Pleas of the Crown* 708; 2 William Russell, *Crimes and Indictable Offenses* 68 (2d ed. 1828); *State v. Trexler*, 4 N.C. 188, 192-93 (N.C. 1815). For example, in *Davies' Case* (Old Bailey, 1712), the court held that an offense was robbery (not merely larceny) where the defendant tried to surreptitiously snatch a sword from a gentleman's side, but "the gentleman perceived" the effort and "himself laid hold of [the sword] at the same time and struggled for it" before the defendant obtained possession. John Rood, *A Digest of Important Cases on the Law of Crimes* § 149 (1906). Similarly, in *Williams v. Commonwealth*, 50 S.W. 240, 240 (Ky. 1899), the court explicitly applying the common law of robbery, upheld a robbery conviction against the defendant's contention that he only committed a larceny where the defendant "wrenched [a] pocketbook out of [the victim's] left hand" and obtained possession because he was "stronger" than she was. The court explained: "It is not necessary that a blow should be struck or the party be injured, to be a violent taking; but if the robber overcomes resistance by force, he is guilty." *Id.* at 241; *see also* William Clark & William Marshall, *A Treatise on the Law of Crimes* 553 (2d ed. 1905) ("[I]f the victim] resists the attempt to rob him, and his resistance is overcome, there is sufficient violence to make the taking robbery, however slight the resistance." (citing *Davies' Case*)).

Second, even in the absence of a struggle between the parties, the "snatching" of an article "constitute[d] robbery" at common law if "the article [wa]s so attached to the person or clothes as to create resistance, however slight." 2 Bishop, *Commentaries* § 968; *accord* 1 William Odgers, *The Common Law of England* 333 (2d ed. 1920). For this proposition, Bishop and Odgers cite *Rex v. Mason*, 168 Eng. Rep. 876, 876 (1820), in which the theft of a watch was deemed a robbery because the defendant used "actual force" to break a chain that had been holding the watch around the victim's neck and thereby "overc[a]me the resistance" created by the chain. Early American common law cases explicitly followed (and arguably extended) *Mason*. For example, in *State v. McCune*, 5 R.I. 60 (1857), the court held that a defendant "used violence" sufficient to sustain a robbery conviction when he pulled and broke "a silk ribbon" holding a watch around the victim's neck. *Id.* At 61-62 (citing *Mason*). And in *State v. Broderick*, 59 Mo. 318 (1875), the court held that "[t[he violence used was sufficient" to sustain a robbery conviction where the defendant stole a watch chain by "seizing [it]" and "br[ea]k[ing] it loose from the watch and the button hole" to which it was attached. *Id.* At 319-21 (citing *Mason*).

Thus, all common law robberies were "violent," but in a very specialized sense of that word. The prosecutor did not need to show that the defendant caused or threatened to cause pain or injury or otherwise used force that was "substantial," "strong," or "extreme," as *Curtis Johnson* requires. 559 U.S. at 140-41. Indeed, courts and commentators often describe robbery as "a battery plus larceny." 4 *Wharton's Criminal Law* § 454; *see* 3 LaFave, *Substantive Criminal Law* § 20.3

("Since it is a battery to administer a drug to an unsuspecting victim, it seems clear that such conduct is 'force' which will do for robbery." (citation omitted)); *Morris v. State*, 993 A.2d 716, 735 (Md. Ct. Spec. App. 2010) ("Robbery is a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)."). And this Court was clear in *Curtis Johnson* that a simple battery does not require the use of physical force within the meaning of § 924(e)(2)(B)(i). 559 U.S. at 139-40. Common law battery is not a violent felony.

The Florida appellate courts, notably, have long recognized that the unarmed robbery offense originally described in Fla. Stat. § 812.13(1) ***was*** common law robbery. *See Montsdoca v. State*, 84 Fla. 82, 86 (1922) (reiterating the common law rules that "[t]here can be no robbery without violence, and there can be no larceny with it," and that "the degree of force used is immaterial"); *State v. Royal*, 490 So.2d 44, 45-46 (Fla. 1986) (acknowledging that "the common law definition of robbery" was "set forth in subsection (1)). As the Florida Supreme Court expressly recognized in *Royal*, the requirement in § 812.13(1) that the taking be by "force, violence, assault, or putting in fear" not only derived from the common law, but the Court had thereafter interpreted that provision "consistent with the common law." *Id.* at 46 (citing *Williams v. Mayo*, 126 Fla. 871, 875, 172 So. 86, 87 (1937)).

The only change to the common law robbery offense incorporated into that statutory provision occurred immediately after – and in response to – *Royal*, when the Florida Legislature broadened the statutory offense to include the use of "force" not only during a taking, but after it as well. *See, e.g., Foster v. State*, 596 So.2d

1099, 1107-1108 (Fla. 5th DCA 1992). Other than that, however, there has been no change to the underlying "common law definition of robbery set forth in subsection (1)," *Royal*, 490 So.2d at 46, to this day.

While the Eleventh Circuit has never acknowledged in its precedential robbery decisions (*Dowd*, *Lockley*, *Seabrooks*, or *Fritts*) that the unarmed robbery offense in Florida *is* essentially common law robbery, the Tenth Circuit in *Harris* did at least acknowledge that "Colorado remains committed to the common law definition of robbery," and defines the required the amount of force "consistent with the common law." *Harris*, 844 F.3d at 1267, 1270. It should have followed from that, and careful review of Colorado caselaw, that Colorado robbery is not a violent felony. *See, e.g., People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996) (holding as a matter of first impression that a purse snatching satisfied the "overcoming resistance" requirement of robbery, if the force was "of an extent that the victim is unable to retain control;" citing other state decisions holding similarly).

But like the Eleventh Circuit in *Fritts*, the Tenth Circuit in *Harris* refused to even consider the significance of *Davis*' facts or holding, given the Colorado Supreme Court's subsequent decision in *People v. Borghesi*, 66 P.3d 93, 99 (Colo. 2003) stating that "the gavamen of the offense of robbery is the *violent* nature of the taking." *Harris*, 844 F.3d at 1267 (emphasis added). Rather than delve beneath the surface of that statement in *Borghesi*, and recognize that "violence" was simply a common law term of art with a unique meaning, the Tenth Circuit summarily rejected the defendant's argument that the Colorado Supreme Court might not have

meant "violent" when it used the term "violence." Rather than deferring to *Davis*, as *Moncrieffe* and *Mathis* dictate, the Tenth Circuit deferred to the dictionary definition of "violent." *Id.*

Had the Tenth and Eleventh Circuits strictly applied the categorical approach as it has been clarified by this Court's recent precedents, and had the Tenth and Eleventh Circuits carefully analyzed the relevant state appellate caselaw as the Fourth Circuit did in *Gardner* and *Winston*, they would have concluded that neither Colorado robbery nor Florida robbery are categorically violent felonies under the ACCA.

B. The Tenth and Eleventh Circuits are in direct conflict with the Fourth Circuit as to whether "overcoming resistance" categorically requires "*violent* force."

In *Gardner*, the Fourth Circuit held that the offense of common law robbery by "violence" in North Carolina did not qualify as a "violent felony" under the ACCA's elements clause because it did not categorically require the use of "physical force." 823 F.3d at 803-804. In reaching that conclusion, the Fourth Circuit did not simply rely upon the common law principles set forth *supra*. Rather, consistent with the categorical approach as clarified by this Court in *Moncrieffe*, *Descamps*, and *Mathis*, the court thoroughly reviewed North Carolina appellate law to determine the least culpable conduct for a North Carolina common law robbery conviction. And notably, it was only after its thorough survey of North Carolina law, that the Fourth Circuit concluded that a North Carolina common law robbery by means of "violence" may be committed by any force "sufficient to compel a victim to part with

his property," and that "'[t]he degree of force used is immaterial.'" *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). In fact, the Fourth Circuit noted, *Sawyer*'s definition "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original).

The Fourth Circuit discussed two supportive North Carolina appellate decisions in detail. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). In *Chance*, the Fourth Circuit noted, a North Carolina court had upheld a robbery conviction where the defendant simply pushed the victim's hand off a carton of cigarettes; that was sufficient "actual force." And in *Eldridge*, a different court upheld a robbery conviction where a defendant merely pushed the shoulder of a store clerk, causing her to fall onto shelves while the defendant took possession of a TV. Based on those decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and that the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*[4]

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[4] Although the Fourth Circuit did not discuss *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000) in *Gardner*, the government had discussed *Robertson* in in its *Gardner* brief, and had correctly described *Robertson* as holding that mere "purse snatching" does not involve sufficient force for a common law robbery conviction in North Carolina. Brief of the United States in *United States v. Gardner*, No. 14-4533 at 46-49, 53 (4th Cir. Aug. 21, 2015). *Robertson* had expressly recognized that North Carolina followed "'[t] rule prevailing in most jurisdictions" that "'the force used . . . must be of such a nature as to show that it was intended to *overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen.*'" *Id.* at 509 (quoting *State v. John*, 50 N.C. 163, 169 (1857)(emphasis added

Thereafter in *Winston*, the Fourth Circuit held that a conviction for Virginia common law robbery, which may be committed by either "violence or intimidation," does not qualify as a "violent felony" within the ACCA's elements clause since – as confirmed by Virginia caselaw – such an offense can be committed by only slight, non-violent force. *Id.* at 685.

The Fourth Circuit acknowledged in *Winston* that prior to *Curtis Johnson*, it had held that a Virginia common law robbery conviction qualified as a "violent felony" within the elements clause. However, citing *Gardner*, the Fourth Circuit rightly found that such precedent was no longer controlling after (1) this Court in *Curtis Johnson* not only redefined "physical force" as "violent force" but made clear that federal courts applying the categorical approach were bound by the state courts' interpretation of their own offenses, and (2) in *Moncrieffe* "instructed that we must focus on the 'minimum conduct criminalized' by state law." *Id.* at 684.

Consistent with these intervening precedents, the Fourth Circuit carefully examined for the first time in *Winston* how the Virginia state courts interpreted a robbery "by violence or intimidation." While noting that its prior decision in *Gardner* was "persuasive," the Fourth Circuit rightly acknowledged that its "conclusion that North Carolina robbery does not qualify as a violent felony" did not itself "compel a similar holding in the present case;" because it was required to "defer to the [Virginia] courts' interpretations of their own [] common law offenses." *Winston*, 850 F.3d at 685 n. 6.

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by *Robertson*)). The Fourth Circuit in *Gardner* was undoubtedly aware from *Robertson* that North Carolina robbery required overcoming victim resistance.

Accordingly, as it had done in *Gardner*, the Fourth Circuit undertook an thorough survey of Virginia appellate decisions on common law robbery. *See id.* at 684-685 (discussing in particular, and finding significant: *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936); *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at * 3 (Va. Ct. App. Dec. 12, 2000) (unpublished); and *Jones v. Commonwealth*, 26 Va. App. 736, 496 S.E.2nd 668, 670 (1998)). Citing these three decisions, the Fourth Circuit concluded that a Virginia common law robbery "by violence" requires only a "'slight' degree of violence;" that "anything which calls out resistance is sufficient;" and "such resistance by the victim does not necessarily reflect use of 'violent force.'" *Winston*, 850 F.3d at 684-685. And therefore, the Fourth Circuit expressly rejected the precise assumption made by the Eleventh Circuit in both *Seabrooks* and *Fritts*, without considering a single Florida decision: namely, that force sufficient to overcome resistance in Florida necessarily involves *violent* force. *Winston, id.* at 683. To the contrary, the Fourth Circuit held, the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include [] 'violent force.'" *Id.* at 685.

Notably, Florida caselaw – like North Carolina and Virginia caselaw – likewise confirms that *violent* force is ***not*** necessary to overcome victim resistance under Fla. Stat. § 812.13(1). Like the North Carolina common law robery offense addressed in *Gardner*, and the Virginia common law robbery offense addressed in *Winston*, a Florida statutory robbery may also be committed by the minimal force

sufficient to overcome a victim's minimal resistance. Indeed, a simple survey of Florida's own appellate law (consistently ignored by the Eleventh Circuit) easily confirms this point.

In *Johnson v. State*, 612 So. 2d 689 (Fla. 1st DCA 1993), a Florida appellate court found force sufficient to tear a scab off a victim's finger was enough to sustain conviction for robbery. *Id.* at 690. In *Sanders v. State*, 769 So. 2d 506 (Fla. 5th DCA 2000), another Florida appellate court affirmed a strongarm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand. The court explained that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders," thus confirming that no more resistance, or "force" than that was necessary for a strongarm robbery conviction under § 812.13(1)). *Id.* at 507-508. In *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001), a Florida court upheld a conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from bebind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred," and did not fall. And most recently, in *Benitez -Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011), one final Florida appellate court decisively rejected a defendant's argument that actual "violence" was necessary for a strongarm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of violence." That

simple act of "tugging," the court held, was sufficient to prove "the use of force to overcome the victim's resistance." *Id.* at 323.

Had the Fourth Circuit heard Mr. Stokeling's case, and specifically considered this Florida caselaw that, it would have found that like the robbery offense in *Gardner*, Florida robbery may be committed by using only a *de minimis* degree force, and therefore does not categorically require the use of "physical force." It has always been the law in Florida (as in North Carolina) that the degree of force is "immaterial." *Montsdoca v. State*, 93 So.157, 159 (Fla. 1922). And, as the Fourth Circuit recognized in *Gardner*, a standard requiring that force overcome resistance, but reaffirming that the degree of force used is "immaterial," suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. The standards in *Sawyer* and *Montsdoca* are similarly worded and functionally indistinguishable.

Plainly, the act of peeling back the victim's fingers in *Sanders* is functionally equivalent to the act of pushing away the victim's hand in *Chance*. Both acts allowed the defendants to overcome the victim's resistance and remove the cigarettes (in *Chance*) and the cash (in *Sanders*) from the victim's grasp. But neither act rises to the level of "*violent* force' required by *Curtis Johnson*. And plainly, the "bump" in *Hayes* is indistinguishable from the "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victim in *Hayes* did not even fall. And the "bump" in *Hayes* also appears to involve less than the "extent of resistance" in *Jones* – which

was the defendant's "jerking" of the victim's purse, which caused her to "turn and face" the defendant, but was not strong enough to cause the victim to fall down. *Winston*, 850 F.3d at 685 (citing *Jones*, 496 S.E. 2nd at 669-670). Moreover, Florida law even suggests that something even less than a "bump" – namely, such *de minimis* conduct as "jostling" a victim during a pickpocketing, *see Rigell v. State*, 782 So.2d 440, 442 (Fla. 4th DCA 2001)(approving LaFave's example) – will constitute sufficient "force" to "overcome resistance," take a person's property, and seal a robbery conviction.

Reading *Montsdoca* as the Fourth Circuit read *Sawyer*, and consulting the pertinent Florida caselaw here, the Court should come to the same conclusion as the Fourth Circuit did first in *Gardner*, and thereafter in *Winston*. It should hold, specifically, that a Florida statutory robbery – despite the fact that it necessitates overcoming "victim resistance" – does not categorically require the use of "*violent* force" in every case. Such an offense falls outside the ACCA's elements clause.

B. The circuit conflict is intractable and untenable. It is prejudicing Tenth and Eleventh Circuit defendants, and should be resolved

In a series of recent decisions since *Fritts*, the Eleventh Circuit – which applies its "prior panel precedent rule" more rigidly than any other circuit in this country[5] – has adhered rigidly to *Fritts*. Not only in Mr. Stokeling's case, but in multiple other cases as well, the Eleventh Circuit continues to affirm ACCA sentences predicated upon Florida robberies based upon *Fritts*. *See, e.g., United*

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[5] *See* the pending petition for writ of certiorari in *Warren Golden v. United States*, No. 17-5050, where certiorari has been sought on that basis.

States v. Conde, ___ Fed. Appx. ___, 2017 WL 1485021 (11th Cir. April. 26, 2017); *United States v. Hughes*, ___ Fed. Appx. ___, 2017 WL 2471207 (11th Cir. June 8, 2017); *United States v. Smith*, ___ Fed. Appx. ___, 2017 WL 2477356 at *2 (11th Cir. June 8, 2017); *United States v. Williams*, ___ Fed. Appx. ___, 2017 WL 2712964 at *2 (11th Cir. June 23, 2017); *United States v. Burke*, ___ F.3d ___, 2017 WL 3044623 (11th Cir. July 19, 2017); *United States v. Everette*, ___ F.3d ___, 2017 WL 3309732 (11th Cir. Aug. 3, 2017).[6]

In *Everette*, notably, the appellant filed a request for an initial en banc hearing with the hopes that the Eleventh Circuit would reconsider *Fritts'* holding that all Florida robbery offenses categorically qualify as ACCA "violent felonies." But not one judge in active service on the court voted for en banc consideration, and Everette's request was summarily denied. *United States v. Everette*, Slip op. (11th Cir. July 31, 2017).

Accordingly, with this spate of recent decisions, the Eleventh Circuit has made undeniably clear that its conflict with the Fourth Circuit is intractable. The Eleventh Circuit will not reconsider whether a Florida robbery offense categorically requires the *Curtis Johnson* level of *violent* force. And it is unlikely that the Tenth Circuit will reconsider whether a Colorado robbery, or any other common law robbery offense, is categorically an ACCA predicate either.

The only hope for defendants in these circuits, plainly, is for this Court to grant certiorari to resolve this conflict once and for all. The instant case presents the Court with a perfect vehicle in which to do that for several reasons. First, the

[6] Certiorari will be sought in all of these cases.

"overcoming resistance" issue raised herein was specifically pressed below. That is not true of all current Eleventh Circuit cases in the pipeline to this Court. Second, if Mr. Stokeling's prior Florida robbery convictions do not qualify as "violent felonies" under the ACCA's elements clause for the reasons raised herein, he was ineligible for enhanced sentencing under the ACCA as the district court originally found. The Eleventh Circuit will have erred in vacating and remanding his case for enhanced sentencing now as an Armed Career Criminal. Mr. Stokeling should serve out the remainder of his 73 month sentence and be released. Finally, this case comes to the Court on direct appeal, and it raises a single discrete issue for review. There are no side issues here, as there often are on collateral review.

Nevertheless, if the Court believes that either another pending Eleventh Circuit case or *Harris* presents a better vehicle for resolving the circuit conflict presented herein, Mr. Stokeling asks that the Court hold his case pending its resolution of the common issues these cases share.

CONCLUSION

Resolution of the elements clause questions raised by Stokeling will have far reaching impact not only for other Eleventh Circuit defendants, but for Tenth Circuit defendants as well. And potentially, it could impact defendants in other circuits with common law robbery convictions or statutory robbery convictions that are based on common law robbery. Until this Court definitively resolves the current circuit conflict on whether overcoming "victim resistance" categorically meets the

ACCA elements clause, other circuits might follow *Fritts* or *Harris* and more defendants will be prejudiced.

The ACCA's elements clause, notably, is identical to the elements clause used in the Career Offender provision of the Guidelines, as well as in the commentary to the reentry guideline, U.S.S.G. § 2L2.1, comment. n. 2. And it is virtually identical to the elements clause in both 18 U.S.C. § 16(a), and in 18 U.S.C. 924(c)(3)(A). Therefore, the Court's resolution of the questions in this case will not only affect which robbery offenses are properly counted as "violent felonies" under the ACCA, and "crimes of violence" under the Guidelines, but potentially (depending upon the Court's resolution of the residual clause question in *Sessions v. Dimaya*, No. 15-1498 (argued Jan. 17, 2017)), which state robbery offenses will qualify as "aggravated felonies" pursuant to 8 U.S.C. 1101(a)(43)(F)(which incorporates the "crime of violence" definition in § 16). Indeed, the questions raised herein might even impact whether federal robbery offenses such as Hobbs Act robbery in violation of 18 U.S.C. § 1951 qualify as § 924(c) predicates going forward.
This case is an excellent vehicle for certiorari for these reasons as well.

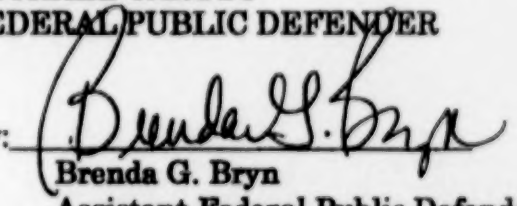
Finally, in the three decades that have passed since Congress amended the ACCA to delete "robbery" and "burglary" as automatic ACCA predicates, replacing those two specific crimes with broader "violent felony" definitions designed to better target the most dangerous gun offenders, the Court has granted certiorari multiple times to determine whether state burglary offenses were proper ACCA predicates. It has never, however, considered an ACCA sentence predicated upon a state

robbery offense. And the time has come to test the government's repeated assertions, accepted now by two circuits with little or no analysis, that *any* robbery offense that requires overcoming "victim resistance" is sufficiently dangerous that it deserves enhanced punishment under the ACCA.

The direct circuit conflict that currently exists on that issue is prejudicing defendants in two federal circuits, and the disparate treatment of defendants in these circuits must come to an end. The Court should grant the writ.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
August 4, 2017

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2017 WL 1279086
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Denard STOKELING, Defendant-Appellee.

No. 16-12951
|
(April 6, 2017)

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:15-cr-20815-JLK-1

Attorneys and Law Firms

Robert Craig Juman, Nicole D. Mariani, Wifredo A. Ferrer, Daya Nathan, Laura Thomas Rivero, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellant

Stewart Glenn Abrams, Michael Caruso, Federal Public Defender, Ian McDonald, Federal Public Defender's Office, Miami, FL, Brenda Greenberg Bryn, Federal Public Defender's Office, Fort Lauderdale, FL, for Defendant-Appellee

Before WILLIAM PRYOR, MARTIN, and BOGGS,* Circuit Judges.

* Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

Opinion

PER CURIAM:

*1 This appeal presents the question whether a conviction for Florida robbery, Fla. Stat. § 812.13, from before Florida passed a "robbery by sudden snatching" statute in 1999, Fla. Stat. § 812.131, categorically qualifies as a violent felony under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The district court did not enhance the sentence of Denard Stokeling under the Act because it held that his robbery conviction was not a violent felony. The United States appealed. Stokeling argues that before 1999, Florida robbery included robbery by sudden snatching, so it did not always require sufficient force to constitute a violent felony. But this argument is foreclosed by our precedents. *E.g.*, *United States v. Fritts*, 841 F.3d 937, 943–44 (11th Cir. 2016). We vacate and remand.

We have held many times that a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the Act, even if it occurred before 1999. *See, e.g.*, *id.* at 938, 943–44 (conviction from 1989); *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) (conviction from 1974). And in *Fritts*, we specifically rejected the argument that the sudden-snatching statute changed the elements of Florida robbery. 841 F.3d at 942–44. We explained that the Florida Supreme Court has held that Florida robbery "has *never* included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to sustain a robbery conviction." *Id.* at 942. "Th [e] new sudden snatching statute was apparently needed *because* ... [ ]robbery [ ] did not cover sudden snatching where there was no resistance by the victim and no physical force to overcome it." *Id.* at 942 n.7 (emphasis added).

Our precedents apply to Florida robbery as well as armed robbery because the elements are identical, differing only in what "the offender carried" "in the course of committing the robbery." Fla. Stat. § 812.13. Our precedents rely on the shared force element in section 812.13(1) and do not mention the additional requirements for armed robbery in section 812.13(2). For example, this Court is bound by *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), which held that "Florida robbery is categorically a crime of violence under the elements of even the least culpable of these acts criminalized by Florida Statutes § 812.13(1)." *Fritts*, 841 F.3d at 941. Stokeling cannot circumvent this holding, even if he presents arguments the prior panel did not consider. *See Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006).

The district court also applied the incorrect method to determine whether a conviction is a violent felony under the Act. The parties agree that the district court erroneously looked to the underlying facts of Stokeling's crime. But the district court should have applied the "categorical approach," which "look[s] only to the elements of the crime, not the underlying facts of the conduct," *United States v. Braun*, 801 F.3d 1301, 1304–05 (11th Cir. 2015).

*2 The force element of Florida robbery satisfies the elements clause of the Act. The Act defines a violent felony as any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). An element of Florida robbery is "the use of force, violence, assault, or putting in fear," Fla. Stat. § 812.13, which requires "resistance by the victim that is overcome by the physical force of the offender." *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997).

We VACATE Stokeling's sentence and REMAND for resentencing.

MARTIN, Circuit Judge, concurring:

I agree with the majority that our Circuit precedent dictates that Mr. Stokeling's prior robbery conviction under Fla. Stat. § 812.13 qualifies as a violent felony as that term is defined by the elements clause of the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e). See United States v. Fritts, 841 F.3d 937, 943–44 (11th Cir. 2016). However, I believe Fritts was wrongly decided.

The Fritts panel did not engage in the categorical analysis the Supreme Court instructed us to use when deciding whether a person's prior conviction requires a longer sentence under ACCA. When it turned its back on the required categorical approach, the Fritts panel failed to give proper deference to McCloud v. State, 335 So.2d 257 (Fla. 1976), the controlling Florida Supreme Court case interpreting § 812.13 from 1976 to 1997. In McCloud, Florida's highest court held that taking by "any degree of force" was sufficient to justify a robbery conviction. Id. at 258–59 (emphasis added). The result of the mistakes in Fritts is that people like Mr. Fritts will serve longer prison sentences that are not authorized by law. Although Mr. Stokeling is not one of those people (he was convicted after the Florida Supreme Court decided Robinson v. State, 692 So.2d 883 (Fla. 1997), which abrogated McCloud's "any degree of force" holding), our reliance on Fritts here gives me the opportunity to talk about what went wrong in that case and why it matters.

I.

The ACCA caps a federal prison sentence for a felon in possession of a firearm at ten years. 18 U.S.C. § 924(a)(2). That is except when the felon has three or more felony convictions, and those felonies are violent or are otherwise serious crimes, his sentence cannot be less than fifteen years. Id. § 924(e). The ACCA defines "violent felony" in more than one way. Id. § 924(e)(2)(B). The Supreme Court has told us that one of those definitions—the "residual clause"—is unconstitutionally vague. Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 2557–58, 192 L.Ed.2d 569 (2015). As a result, a person's prior robbery conviction can serve as a basis for an ACCA sentence enhancement only if it meets another definition of "violent felony" from what is known as ACCA's "elements clause." 18 U.S.C. § 924(e)(2)(B)(i) ("As used in this subsection ... the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year ... that has as an element the use, attempted use, or threatened use of physical force against the person of another."). So a prior robbery conviction can serve as an ACCA predicate only if it has "as an element the use, attempted use, or threatened use of physical force against the person of another." Id.

When deciding whether a person's prior conviction qualifies as one requiring a longer sentence under ACCA, courts must first apply what is called the formal categorical approach. Under this approach, we do not look at the facts that resulted in the earlier conviction. Descamps v. United States, 570 U.S. ——, 133 S.Ct. 2276, 2283, 186 L.Ed.2d 438 (2013). Instead, Supreme Court precedent requires us to look only to the elements of the statute under which the person was convicted. See Mathis v. United States, 579 U.S. ——, 136 S.Ct. 2243, 2251, 195 L.Ed.2d 604 (2016). We must decide whether, in order to be convicted under a given statute, a person was required to use, attempt to use, or threaten to use physical force against another person.

*3 In keeping with this, I will apply the formal categorical approach to decide whether a conviction under § 812.13 counts as a violent felony under the ACCA. If a defendant

could have been convicted under § 812.13 without the use, attempted use, or threatened use of "violent force," Curtis Johnson v. United States, 559 U.S. 133, 140, 130 S.Ct. 1265, 1271, 176 L.Ed.2d 1 (2010) (interpreting "physical force" in the elements clause), or a "substantial degree of force," United States v. Owens, 672 F.3d 966, 971 (11th Cir. 2012) (holding that second-degree rape in Alabama doesn't require "physical force" as defined by Curtis Johnson), against another person, then that defendant's prior conviction under § 812.13 can't be a "violent felony" under the ACCA's elements clause.

In recent years, the Supreme Court has clarified the analytical steps that make up the formal categorical approach. In taking that approach, we must first "presume that the conviction rested upon nothing more than the least of the acts criminalized" by the state statute. Moncrieffe v. Holder, 569 U.S. ——, 133 S.Ct. 1678, 1684, 185 L.Ed.2d 727 (2013) (alterations adopted and quotation omitted). This is often referred to as the "least culpable conduct." See Donawa v. U.S. Att'y Gen., 735 F.3d 1275, 1283 (11th Cir. 2013) (citing Moncrieffe, 133 S.Ct. at 1685). To identify the least culpable conduct criminalized by the statute, we look to the state courts' interpretations of the statute. See Curtis Johnson, 559 U.S. at 138, 130 S.Ct. 1265 ("We are [ ] bound by the Florida Supreme Court's interpretation of state law ... in determining whether a felony conviction for battery under Fla. Stat. § 784.03(2) meets the definition of 'violent felony' in 18 U.S.C. § 924(e)(2)(B)(i)."); see also United States v. Rosales-Bruno, 676 F.3d 1017, 1021 (11th Cir. 2012) ("[W]e look to Florida case law to determine whether a conviction under § 787.02 necessarily involves the employment of 'physical force' as that term is defined by federal law."). And as part of this step, we have to analyze "the version of state law that the defendant was actually convicted of violating." McNeill v. United States, 563 U.S. 816, 821, 131 S.Ct. 2218, 2222, 180 L.Ed.2d 35 (2011).

Second, after identifying the least culpable conduct, we then have to figure out whether "those acts are encompassed by the generic federal offense." Moncrieffe, 133 S.Ct. at 1684 (alteration adopted). In the elements clause context, this means we examine whether the least culpable conduct involved the use, attempted use, or threatened use of violent force or a substantial degree of force. If it didn't, then under the formal categorical approach, the defendant's earlier conviction is not a violent felony.

II.

These recent Supreme Court cases tell us that a § 812.13 unarmed robbery conviction sustained while McCloud was controlling Florida law does not fall within the ACCA's elements clause. First, heeding the Supreme Court's instruction that we should "turn[ ] to the version" of § 812.13 that a defendant was "actually convicted of violating," McNeill, 563 U.S. at 821, 131 S.Ct. at 2222, we must look to what the Florida state courts said about the conduct that could support a robbery conviction under § 812.13 at the time the defendant was convicted. More to the point, we must look to how Florida courts defined the least culpable conduct—in this case, the smallest degree of force—sufficient to support a § 812.13 robbery conviction at that time.

Section 812.13 defines robbery as the taking of money or property with intent to deprive when "in the course of the taking there is the use of force, violence, assault, or putting in fear." From 1976 to 1997, the controlling precedent from the Florida Supreme Court held that "[a]ny degree of force suffices to convert larceny into a robbery." McCloud, 335 So.2d at 258 (emphasis added). So during that time period, Florida law was clear that conduct involving "any degree of force," like sudden snatching, was enough to justify a robbery conviction.

*4 In keeping with the deference federal courts owe states' interpretations of their own criminal statutes, this Court has recognized and accepted Florida's view of what it took to sustain a conviction under the Florida robbery statute when McCloud was the controlling precedent. In United States v. Welch, 683 F.3d 1304 (11th Cir. 2012), this Court used the formal categorical approach to determine that sudden snatching was the least culpable conduct that could support a 1996 Florida robbery conviction. Id. at 1311–12. This decision was necessary to Welch's holding that the 1996 Florida robbery conviction was categorically a violent felony under the residual clause. Id. at 1313–14. Our precedent therefore binds us to Welch's conclusion that sudden snatching was the least culpable conduct covered by § 812.13 when McCloud was the controlling Florida case defining that statute.

Having identified the least culpable conduct, we are next required to decide whether this conduct necessarily involves the use, attempted use, or threatened use of violent force or a substantial degree of force. It doesn't. Sudden snatching with "any degree of force," McCloud, 335 So.2d at 258, plainly does not require the use of "a substantial degree of force." Owens, 672 F.3d at 971. Neither does it necessarily entail "violent force—that is, force capable of causing physical pain or injury to another person." Curtis Johnson, 559 U.S. at 140, 130 S.Ct. at 1271. This means a conviction for Florida unarmed robbery during the time McCloud was controlling should not count as a violent felony within the meaning of the elements clause.

III.

In reaching its (erroneous) conclusion that a 1989 armed robbery conviction under § 812.13 falls within the elements clause under the formal categorical approach, the Fritts panel sidestepped McCloud's "any degree of force" holding by looking instead to our own court's previous decision in United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011). See Fritts, 841 F.3d at 940–42. And when it did, that panel stretched Lockley well past its limits.

Lockley held that a 2001 Florida attempted robbery conviction under § 812.13(1) categorically counts as a "crime of violence" within the meaning of the identically-worded elements clause of the Sentencing Guidelines. See 632 F.3d at 1240–41, 1244–45. But Lockley looked to Florida law as it existed in 2001, when Mr. Lockley was convicted, and not as it existed in 1989, when Mr. Fritts was convicted. Id. at 1240 n.1, 1242. Again, the year of conviction matters because the least culpable conduct sufficient to support a robbery conviction under Fla. Stat. § 812.13 changed in 1997. As I've set out above, the controlling Florida Supreme Court case from 1976 to 1997 (McCloud) held that conduct involving "any degree of force," was enough for a robbery conviction. 335 So.2d at 258. However, in 1997 the Florida Supreme Court shifted course and held that robbery requires the perpetrator to use "more than the force necessary to remove the property from the person"—that is, "physical force" that "overcome[s]" the "resistance [of] the victim." Robinson, 692 So.2d at 886.

A Florida robbery conviction could no longer be supported by "any degree of force" after the Florida Supreme Court decided Robinson in 1997. For that reason, the Lockley court correctly identified "[p]utting in fear"—and not sudden snatching—as the least culpable conduct in its categorical analysis of Mr. Lockley's 2001 attempted robbery conviction. 632 F.3d at 1244. But again, the Supreme Court has told us to look at what state courts required for a conviction at the time of that conviction. See McNeill, 563 U.S. at 821, 131 S.Ct. at 2222. And our 2011 federal court ruling doesn't change the fact that before the 1997 Florida Supreme Court ruling in Robinson the least culpable conduct for which someone could be convicted of robbery in Florida was sudden snatching with any degree of force. Lockley looked, as it should have, to a different time, so it did not apply to Mr. Fritts's appeal and has no bearing on any robbery convictions sustained while the Florida Supreme Court's 1976 ruling in McCloud was still good law.

*5 The Fritts panel insisted that Lockley isn't limited to post-Robinson robberies—but instead applies to all Florida robberies—because § 812.13 has never included sudden snatching. Fritts, 841 F.3d at 943. As support, it pointed to language in Robinson suggesting that § 812.13 has always required more than sudden snatching. Id. It also emphasized that when the Florida Supreme Court interprets a Florida statute, "it tells us what that statute always meant." Id. But again, this reasoning ignores what the Supreme Court told us about how to conduct the categorical analysis. [1] See McNeill, 563 U.S. at 821, 131 S.Ct. at 2222 ("The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction."). McCloud was controlling Florida Supreme Court law from 1976 to 1997, and it said "any degree of force" could support a robbery conviction. 335 So.2d at 258. Regardless of how the Florida Supreme Court characterized McCloud in its Robinson decision, there is no erasing the fact that conduct involving minimal force was prosecuted as robbery when McCloud was the controlling precedent. See, e.g., Santiago v. State, 497 So.2d 975, 976 (Fla. 4th DCA 1986) (upholding a robbery conviction because robbery required only "ever so little" force).

1 It's generally true that when a court interprets a statute it tells us what the statute has always meant. But here our interest is not in divining the true meaning of § 812.13. Rather, our interest is in

> understanding what conduct could have resulted in convictions under the statute between 1976 and 1997, even if Florida courts were misinterpreting the statute during that time.

Another problem with Fritts's reliance on Robinson for the proposition that § 812.13 has never included sudden snatching is that it was plainly foreclosed by our own decision in Welch. In looking to the version of § 812.13 under which Mr. Welch was convicted, the Welch panel acknowledged and even discussed Robinson, but it did not adopt Robinson's suggestion that sudden snatching had never been sufficient to support a conviction under § 812.13. Welch, 683 F.3d at 1311–12. Rather, it identified sudden snatching as the least culpable conduct for which a person could be convicted under the statute because Mr. Welch pleaded guilty in 1996—before Robinson was decided. Id. And 1996 was "a time when the controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into a robbery." Id. at 1311 (quoting McCloud, 335 So.2d at 258–59).

* * *

Fritts was wrong to suggest that all unarmed robbery convictions under Fla. Stat. § 812.13 are violent felonies as defined by ACCA's elements clause because use of "any degree of force" could support a § 812.13 conviction from 1976 to 1997. This mistake will continue to have enormous consequences for many criminal defendants who come before our Court. For that reason, and even though Fritts's mistakes do not affect Mr. Stokeling, I feel compelled to explain the error in Fritts's statement, relied on here by the majority, that § 812.13 "has never included a theft or taking by mere [sudden] snatching." Fritts, 841 F.3d at 942.

All Citations

— Fed.Appx. —, 2017 WL 1279086 (Mem)

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A-2

FILED by TB D.C.
Oct 20, 2015
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

15-20815-CR-KING/TORRES

CASE NO._____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(e)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

DENARD STOKELING,

Defendant.

_____/

INDICTMENT

The Grand Jury charges that:

On or about August 27, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

DENARD STOKELING,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

FORFEITURE ALLEGATIONS

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **DENARD STOKELING**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g)(1), as alleged in this Indictment, the defendant, **DENARD STOKELING**, shall forfeit to the United States of America any firearm or ammunition involved in or used in the commission of such violation.

All pursuant to Title 18, United States Code, Section 924(d)(1), and the procedures set forth in Title 21, United States Code, Section 853, as made applicable by Title 28, United States Code, Section 2461(c).

A TRUE BILL

FOREPERSON

WIFREDO A. FERRER
UNITED STATES ATTORNEY

DAYA NATHAN
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA **CASE NO.** _____

v.

DENARD STOKELING,

Defendant.

_____ /

Superseding Case Information:

Court Division: (Select One)

X	Miami	___	Key West		
___	FTL	___	WPB	___	FTP

New Defendant(s) Yes ____ No ___
Number of New Defendants ____
Total number of counts ____

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect _____

4. This case will take 2-3 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	x	Petty	
II	6 to 10 days		Minor	
III	11 to 20 days		Misdem.	
IV	21 to 60 days		Felony	x
V	61 days and over			

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) No
If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of August 27, 2015 (released on bond October 5, 2015)
Rule 20 from the District of
Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes ____ No x

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes ____ No x

_____
DAYANATHAN
ASSISTANT UNITED STATES ATTORNEY
FLORIDA BAR NO. 74392

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: DENARD STOKELING

Case No: _____

Count #: 1

Possession of a Firearm and Ammunition by a Convicted Felon

Title 18, United States Code, Sections 922(g)(1) and 924(e)(1)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

A-3

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

DENARD STOKELING

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:15-20815-CR-KING-001

USM Number: 08673-104

Counsel For Defendant: Stewart O. Abrams, AFPD
Counsel For The United States: Daya Nathan, AUSA
Court Reporter: Glenda Powers

The defendant pleaded guilty to Count One of the Indictment.
The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1) and 924(e)	Possession of a firearm and ammunition by a convicted felon	August 27, 2015	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
4/28/2016

JAMES LAWRENCE KING
United States District Judge

April 28, 2016

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **SEVENTY-THREE (73) Months to run concurrent with State case no. F15017823.**

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a State of Florida facility.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) Years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner, Denard Stokeling, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the Petition for Writ of Certiorari filed in the above-styled matter was placed in the U.S. mail in a prepaid first class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 4th day of August, 2017.

MICHAEL CARUSO
Federal Public Defender

Fort Lauderdale, Florida
August 4, 2017

By: _____

Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this 4th day of August, 2017, in accordance with SUP. CT. R. 29, eleven copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by U.S. mail upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

MICHAEL CARUSO
Federal Public Defender

Fort Lauderdale, Florida
August 4, 2017

By: Brenda G. Bryn

Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Denard Stokeling, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
Federal Public Defender

Fort Lauderdale, Florida
August 4, 2017

By: Brenda G. Bryn

Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436

No. 17-5554

IN THE SUPREME COURT OF THE UNITED STATES

DENARD STOKELING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior conviction for robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1995), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-5554

DENARD STOKELING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-5) is not published in the Federal Reporter but is reprinted at 684 Fed. Appx. 870.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2017. On June 12, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 4, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. A3, at 1. He was sentenced to 73 months of imprisonment, to be followed by two years of supervised release. Id. at 2-3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A1, at 1-5.

1. On July 27, 2015, petitioner and an accomplice burglarized a restaurant where petitioner was an employee in Miami Beach, Florida. D. Ct. Doc. 30, at 1 (Mar. 2, 2016). Police officers subsequently approached petitioner as he was reporting to work. Ibid. When the officers asked petitioner whether he had any weapons on him, petitioner stated that he had a gun in his backpack and handed the backpack to the officers. Id. at 1-2. The officers found a semi-automatic firearm, a magazine, and 12 rounds of ammunition in petitioner's backpack. Id. at 2.

2. a. A federal grand jury in the Southern District of Florida returned a one-count indictment charging petitioner with knowingly possessing a firearm and ammunition after having been previously convicted of a felony, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. A2, at 1. Petitioner pleaded guilty. Pet. App. A3, at 1.

b. A conviction for violating Section 922(g)(1) typically exposes the offender to a statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Johnson v. United States, 559 U.S. 133 (2010), this Court defined "physical force" under the ACCA's elements clause to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140.

c. The Probation Office classified petitioner as an armed career criminal under the ACCA based on three prior Florida convictions, including a 1997 conviction for robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1995). See Presentence Investigation Report (PSR) ¶¶ 17, 25; D. Ct. Doc. 40-1, at 2 (Apr. 27, 2016). Under Section 812.13, "'[r]obbery' means the taking of money or other property * * * with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. Ann. § 812.13(1) (West 1995).

Petitioner objected to his classification as an armed career criminal. D. Ct. Doc. 36 (Apr. 20, 2016). He argued, inter alia, that his 1997 robbery conviction under Section 812.13 did not qualify as a "violent felony" under the ACCA's elements clause. Id. at 2-3. Petitioner noted that in 1999, the Florida legislature enacted a separate statute prohibiting "robbery by sudden snatching." Id. at 3; see Fla. Stat. Ann. § 812.131(1) (West 1999) (defining "[r]obbery by sudden snatching"). Petitioner argued that before that statute was enacted, robbery by sudden snatching was prosecuted as robbery under Section 812.13. D. Ct. Doc. 36, at 4. He further argued that "robbery by sudden snatching does not 'have as an element' the use or threatened use of violent force, as necessitated by Johnson." Id. at 5. Petitioner thus

contended that before 1999, Florida robbery in violation of Section 812.13 was not categorically a "violent felony" under the ACCA's elements clause. Ibid.

d. The district court determined that petitioner's 1997 robbery conviction under Section 812.13 did not qualify as a "violent felony" under the ACCA. Sent. Tr. 10-11. The court recited the facts underlying the 1997 conviction -- that petitioner "grabbed [the victim] by the neck and tried to remove her necklaces" while she "held onto" them, id. at 10 -- and concluded that "these facts do not qualify under the existing law to justify an enhancement," id. at 11. The court sentenced petitioner to 73 months of imprisonment. Id. at 23.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A1, at 1-5.

The court of appeals explained that it had "held many times that a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA], even if it occurred before 1999." Pet. App. A1, at 1 (citing United States v. Fritts, 841 F.3d 937, 938, 943-944 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017), and United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir.), cert. denied, 549 U.S. 941 (2006)). The court observed that in Fritts, it had "specifically rejected the argument that the sudden-snatching statute changed the elements of Florida robbery" and "explained

that the Florida Supreme Court has held that Florida robbery 'has never included a theft or taking by mere snatching.'" Ibid. (quoting Fritts, 841 F.3d at 942). Quoting its reasoning in Fritts, the court explained that the "new sudden snatching statute was apparently needed because . . . robbery did not cover sudden snatching where there was no resistance by the victim and no physical force to overcome it." Ibid. (brackets omitted) (quoting Fritts, 841 F.3d at 943 n.7). The court thus reaffirmed that even before 1999, Florida robbery "require[d] 'resistance by the victim that is overcome by the physical force of the offender.'" Id. at 2 (citation omitted).

The court of appeals also noted the parties' agreement that the district court "erroneously looked to the underlying facts" of petitioner's offense to make its own case-specific judgment about whether his conviction was a violent felony under the ACCA. Pet. App. A1, at 2. The court of appeals explained that the district court should have instead "applied the 'categorical approach,' which 'looks only to the elements of the crime.'" Ibid. (brackets and citation omitted). Applying that approach, the court of appeals determined that Florida robbery is a "violent felony" under the elements clause of the ACCA because "[a]n element of Florida robbery is 'the use of force, violence, assault, or putting in fear,' Fla. Stat. § 812.13, which requires 'resistance by the

victim that is overcome by the physical force of the offender.'" Ibid. (quoting Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997)).

Judge Martin concurred. Pet. App. A1, at 2-5. She viewed state decisional law to illustrate that a Florida robbery conviction between 1976 and 1997 should not be a "violent felony" under the ACCA and disagreed with circuit precedent concluding otherwise. Id. at 2. But she recognized that because petitioner was convicted following that period, any such "mistakes do not affect" him. Id. at 2, 5.

ARGUMENT

Petitioner contends (Pet. 9-26) that his prior conviction for Florida robbery is not a "violent felony" under the ACCA's elements clause. The court of appeals correctly determined that Florida robbery is a "violent felony." Pet. App. A1, at 1. Although a shallow circuit conflict exists on the issue, that conflict does not warrant this Court's review because the issue is fundamentally premised on the interpretation of a specific state law and lacks broad legal importance. Further review is not warranted.

1. The court of appeals correctly determined that Florida robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1995), categorically qualifies as a "violent felony" under the ACCA's elements clause, which encompasses "any crime punishable by imprisonment for a term exceeding one year" that "has as an element

the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i).

a. Florida's robbery statute provides in relevant part that robbery is "the taking of money or other property * * * from the person or custody of another" through "the use of force, violence, assault, or putting in fear." Fla. Stat. Ann. § 812.13(1) (West 1995). Under the putting-in-fear prong, "the fear contemplated by the statute is the fear of death or great bodily harm." United States v. Lockley, 632 F.3d 1238, 1242 (11th Cir.) (brackets omitted) (quoting Magnotti v. State, 842 So. 2d 963, 965 (Fla. Dist. Ct. App. 2003)), cert. denied, 565 U.S. 885 (2011). Thus, "robbery under th[e] statute requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm." Id. at 1245.

In Robinson v. State, 692 So. 2d 883 (1997), the Florida Supreme Court addressed "whether the snatching of property by no more force than is necessary to remove the property from a person who does not resist" satisfies the "force or violence element required by Florida's robbery statute." Id. at 884-885. The court surveyed Florida cases -- including McCloud v. State, 335 So. 2d 257 (Fla. 1976), Montsdoca v. State, 93 So. 157 (Fla. 1922), and various other appellate decisions dating back to 1903, see, e.g., Colby v. State, 35 So. 189 (Fla. 1903) -- and confirmed that "the

perpetrator must employ more than the force necessary to remove the property from the person." Robinson, 692 So. 2d at 886. Rather, there must be both "resistance by the victim" and "physical force [by] the offender" that overcomes that resistance. Ibid.; see also id. at 887 ("Florida courts have consistently recognized that in snatching situations, the element of force as defined herein distinguishes the offenses of theft and robbery.").

Under Johnson v. United States, 559 U.S. 133 (2010), "physical force" for purposes of the ACCA's elements clause requires "violent force -- that is, force capable of causing physical pain or injury to another person," id. at 140, which might "consist of * * * only that degree of force necessary to inflict pain," such as "a slap in the face," id. at 143. The degree of force required under Florida's robbery statute -- "physical force" necessary to "overcome" "resistance by the victim," Robinson, 692 So. 2d at 886 -- satisfies that standard. Force sufficient to prevail in a physical contest for possession of the stolen item is necessarily force "capable" of "inflict[ing] pain" equivalent to "a slap in the face," Johnson, 559 U.S. at 140, 143; Florida robbery could not occur through "mere unwanted touching," id. at 142. The court of appeals thus correctly determined that because the "force element of Florida robbery satisfies the elements clause of the [ACCA]," Florida robbery is categorically a "violent felony." Pet. App. A1, at 2.

b. Contrary to petitioner's contention (Pet. 9-12, 20), the court of appeals faithfully applied the categorical approach as prescribed by this Court's decisions in Mathis v. United States, 136 S. Ct. 2243 (2016), Descamps v. United States, 133 S. Ct. 2276 (2013), and Moncrieffe v. Holder, 569 U.S. 184 (2013). Petitioner suggests (Pet. 9-10) that the court of appeals departed from those decisions by failing to evaluate whether the least culpable conduct penalized by Florida's robbery statute involved "physical force." But the court concluded that all violations of Section 812.13 involve such force. See Pet. App. A1, at 1 ("[A] conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA], even if it occurred before 1999."); ibid. ("[T]he Florida Supreme Court has held that Florida robbery 'has never included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to sustain a robbery conviction.'") (quoting United States v. Fritts, 841 F.3d 937, 942 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)).

c. Petitioner cites several Florida appellate decisions (Pet. 24-25) that he argues demonstrate that Florida robbery may involve no more than de minimis force. But those cases do not establish that Florida robbery may involve a degree of force less than the "physical force" required by the ACCA's elements clause.

In Montsdoca v. State, supra, the Florida Supreme Court stated that "[t]he degree of force used is immaterial," but only if "such force * * * is actually sufficient to overcome the victim's resistance." 93 So. at 159. Montsdoca involved the "violent or forceful taking" of an automobile, whereby the defendants, under a false pretense of official authority, "grabbed" the victim "by both shoulders," "shook him," "ordered him to get out of the car," and demanded his money "under the fear of bodily injury if he refused." Ibid. Montsdoca thus involved a degree of force greater than de minimis.

In Sanders v. State, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000), the Florida intermediate appellate court affirmed the robbery conviction of a defendant who peeled back the victim's fingers from a clenched fist before snatching money out of his hand. Id. at 507. Bending back someone's fingers with force sufficient to overcome his efforts to keep hold of an object involves more than the "merest touching," Johnson, 559 U.S. at 139, and is "capable of causing physical pain or injury," id. at 140. Indeed, the court contrasted the force used in Sanders with the circumstances of a prior case, in which merely "touch[ing] or brush[ing]" the victim's hand in the course of taking money was "insufficient to constitute the crime of robbery" under Florida law. 769 So. 2d at 507 (discussing Goldsmith v. State, 573 So. 2d 445 (Fla. Dist. Ct. App. 1991)).

In Benitez-Saldana v. State, 67 So. 3d 320 (Fla. Dist. Ct. App. 2011), the court determined that trial counsel rendered ineffective assistance by conceding that the defendant engaged in conduct on which "a conviction for robbery may be based" -- namely, "a tug-of-war over the victim's purse." Id. at 323. The victim testified that in the course of the tug of war, the defendant grabbed her arm, causing an abrasion. Id. at 322. The conduct in Benitez-Saldana thus involved a "degree of force necessary to inflict pain," not unlike "a slap in the face." Johnson, 559 U.S. at 143.

In Hayes v. State, 780 So. 2d 918 (Fla. Dist. Ct. App. 2001) (per curiam), the record reflected that the defendant "bumped" the victim with sufficient force that she would have fallen if not for the fact that "she was in between rows of cars when the robbery occurred." Id. at 919. And in Winston Johnson v. State, 612 So. 2d 689 (Fla. Dist. Ct. App. 1993), the defendant "used sufficient force" not only "to remove the money," but also "to cause slight injury" to the victim's hand. Id. at 691. In each of those cases, the defendant used "force capable of causing physical pain or injury to another person" -- in Hayes, force otherwise strong enough to cause the victim to fall, and in Winston

Johnson, force that actually caused injury. Johnson, 559 U.S. at 140.*

d. Petitioner contends (Pet. 17) that robbery as traditionally defined under the common law did not require any showing that the defendant used more than de minimis force. But this Court is "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of" Florida robbery. Johnson, 559 U.S. at 138. And the Florida Supreme Court has rejected the view that "the degree of force used to snatch a victim's property from his person, even when the victim does not resist and is not injured, is sufficient to satisfy the force element of Florida's robbery offense." Robinson, 692 So. 2d at 886. That authoritative interpretation of Florida's robbery statute -- not petitioner's contentions regarding "common law robbery," Pet. 18 -- governs whether his prior conviction qualifies as a "violent felony" under the ACCA.

---

* Petitioner does not cite McCloud v. State, supra, which in any event would not assist him. The defendant in McCloud "exert[ed] physical force to extract [the victim's purse] from her grasp," causing the victim to fall to the ground. 335 So. 2d at 259. The evidence also "showed that [the defendant] attempted to kick his victim while she lay on the ground and after the purse had been secured." Ibid. The force employed by the defendant in McCloud was plainly "capable of causing physical pain or injury to another person" and would thus qualify as "physical force" under the ACCA's elements clause. Johnson, 559 U.S. at 140. The court's statement that "[a]ny degree of force suffices to convert larceny into a robbery," McCloud, 335 So. 2d at 258, was therefore dictum, which was effectively repudiated in Robinson, 692 So. 2d at 886.

2. Although a shallow conflict exists between the Ninth and Eleventh Circuits on whether Florida robbery in violation of Section 812.13 qualifies as a "violent felony" under the ACCA's elements clause, that conflict does not warrant this Court's review.

a. The outcomes in the cases petitioner identifies in the petition (Pet. 20-23) and his first supplemental brief (Supp. Br. 1) arise not from any disagreement about the meaning of "physical force" under Johnson, but from differences in how States define robbery. Some courts of appeals have determined that a State's definition of robbery does not satisfy the ACCA's elements clause because "even de minimis contact" can constitute the force necessary to support a robbery conviction. United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016).

In Gardner, for example, the Fourth Circuit understood North Carolina law to require only that the "degree of force" be "sufficient to compel the victim to part with his property." 823 F.3d at 803 (citation omitted). In United States v. Winston, 850 F.3d 677 (2017), the Fourth Circuit understood Virginia law to require "only a 'slight' degree" of force, id. at 684 (citation omitted), a standard satisfied by a "defendant's act of 'physical jerking,' which was not strong enough to cause the victim to fall," id. at 685 (citation omitted). And in United States v. Yates, 866 F.3d 723 (2017), the Sixth Circuit understood Ohio law to require

only "nonviolent force, such as the force inherent in a purse-snatching incident or from bumping against an individual." Id. at 732; see also United States v. Mulkern, 854 F.3d 87, 93-94 (1st Cir. 2017) (Maine robbery); United States v. Eason, 829 F.3d 633, 641-642 (8th Cir. 2016) (Arkansas robbery); United States v. Parnell, 818 F.3d 974, 978-980 (9th Cir. 2016) (Massachusetts armed robbery). In those cases, the degree of force required under state law was not sufficient to satisfy the ACCA's elements clause.

In other cases, such as this one, a court of appeals has determined that a State's definition of robbery does satisfy the ACCA's elements clause because the State requires force greater than the de minimis amount necessary to remove the property from the person. In United States v. Harris, 844 F.3d 1260 (2017), petition for cert. pending, No. 16-8616 (filed Apr. 4, 2017), for example, the Tenth Circuit relied on Colorado precedent stating that "the gravamen of the offense of robbery is the violent nature of the taking." Id. at 1267 (citation omitted). And other courts -- including the Fourth and Sixth Circuits, which petitioner places on the other side of his alleged conflict -- have reached similar state-statute-specific conclusions as to particular robbery offenses. See, e.g., United States v. Patterson, 853 F.3d 298, 302-305 (6th Cir.) (Ohio aggravated robbery), cert. denied, 138 S. Ct. 273 (2017); United States v. Doctor, 842 F.3d 306, 311-312 (4th Cir. 2016) (South Carolina robbery), cert. denied, 137 S. Ct.

1831 (2017); United States v. Duncan, 833 F.3d 751, 754-756 (7th Cir. 2016) (Indiana robbery); United States v. Priddy, 808 F.3d 676, 686 (6th Cir. 2015) (Tennessee robbery), abrogated on other grounds, United States v. Stitt, 860 F.3d 854, 855 (6th Cir. 2017) (en banc).

Because differences in state definitions of robbery explain why robbery in some States, but not others, is a "violent felony," the courts' decisions do not suggest any conflict meriting this Court's review. Cf. Winston, 850 F.3d at 686 ("The state courts of Virginia and North Carolina are free to define common law robbery in their respective jurisdictions in a manner different from that employed by federal courts in construing a federal statute.").

b. In United States v. Geozos, 870 F.3d 890 (2017), the Ninth Circuit determined that Florida robbery is not categorically a "violent felony." Id. at 901. The Ninth Circuit acknowledged that under Robinson, "there must be resistance by the victim that is overcome by the physical force of the offender." Id. at 900 (quoting Robinson, 692 So. 2d at 886). But the Ninth Circuit read the Florida cases to mean that "the Florida robbery statute proscribes the taking of property even when the force used to take that property is minimal." Id. at 901. The Ninth Circuit recognized that its decision "put [it] at odds with the Eleventh Circuit," but it suggested that the Eleventh Circuit had

"overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." Ibid.

The shallow conflict between the Ninth and Eleventh Circuits does not warrant this Court's review. This Court has repeatedly denied petitions for writs of certiorari that raised the same issue of whether Florida robbery is a "violent felony." See United States v. Bostick, 675 Fed. Appx. 948 (11th Cir.) (per curiam), cert. denied, 137 S. Ct. 2272 (2017); United States v. McCloud, No. 16-15855 (11th Cir. Dec. 22, 2016), cert. denied, 137 S. Ct. 2296 (2017); Fritts, 841 F.3d 937, cert. denied, 137 S. Ct. 2264 (2017); United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017); United States v. Durham, 659 Fed. Appx. 990 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2264 (2017). Notwithstanding the narrow conflict created by the Ninth Circuit's recent decision in Geozos, supra, the same result is warranted here.

Although the issue of whether Florida robbery is a "violent felony" arises under the ACCA, it is fundamentally premised on the interpretation of a specific state law. The Ninth and the Eleventh Circuits may disagree about the degree of force required to support a robbery conviction under Florida law, but as petitioner's extensive discussion of state-court decisions demonstrates (Pet. 20-26), that state-law issue turns on "Florida caselaw." As such,

the issue does not warrant this Court's review. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) ("Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located."), abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

The issue of whether Florida robbery is a "violent felony" also does not present an issue of broad legal importance. The issue arises only with respect to defendants with prior convictions for Florida robbery. Accordingly, the issue is unlikely to recur with great frequency in the Ninth Circuit, which sits on the other side of the country. Should that prove to be incorrect, there will be ample opportunity for the government to seek further review in that circuit or in this Court. At this time, however, the issue is not of sufficient recurring importance in the Ninth Circuit to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2017

NO: 17-5554

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government expressly concedes (BIO at 7, 14, 17) that the Eleventh and Ninth Circuits are split on whether Florida robbery qualifies as an ACCA violent felony. And it does not dispute that this case is a perfect vehicle to resolve that circuit conflict. Instead, it asserts that this undisputed conflict does not warrant resolution, because it involves the interpretation of "a specific state law" and lacks "broad legal importance." BIO at 7. Neither assertion is persuasive.

I. The Circuits Are Divided on a Question of Federal Law

Contrary to the government's suggestion, the Eleventh and Ninth Circuits agree completely about Florida law. They agree that, in order to commit robbery, there must be "force sufficient to overcome a victim's resistance." *Robinson v. State*, 692 So.2d 883, 886-87 (Fla. 1997). And they agree that "[t]he degree of force used is *immaterial*," so long as it is "sufficient to overcome the victim's resistance." *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922) (emphasis added). *See United States v. Fritts*, 841 F.3d 937, 943-944 (11th Cir. 2016) (citing *Robinson* and *Montsdoca* as authoritative); *United States v. Geozos*, 870 F.3d 890, 900-901 (9th Cir. 2017) (same). The parties likewise agree that this is the governing legal standard in Florida. *See* BIO at 8-9, 11, 13. Thus, there is no dispute "about the degree of force required to support a robbery conviction under Florida law." BIO at 17. Rather, the disagreement instead lies in whether the force necessary to overcome the victim's resistance is categorically "physical force" under the ACCA's elements clause in 18 U.S.C. § 924(e)(2)(B)(i). And, of course, "[t]he meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law." *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010).

The government does not dispute that, to resolve that federal question, the Court must look to the "least culpable conduct" punishable as robbery in Florida, and intermediate appellate decisions illustrate the type of conduct so punishable. *See* BIO at 10-13 (consulting state decisional law to determine least culpable conduct). The parties are thus in agreement on the proper approach. And so too are they in agreement on the type of conduct punishable as robbery in Florida. The government acknowledges (BIO at 11-13) that "overcoming resistance" can involve no more than a "tug-of-war" over a purse, as in *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011); bumping a victim from behind, as in *Hayes v. State*, 780 So.2d 918 (Fla. 1st DCA 2011); or removing money from a victim's clenched fist, as in *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000) and *Winston Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993). There is no dispute about the facts of any of these Florida robbery cases. Rather, the only dispute is whether the type of force described therein (i.e., force necessary to overcome minimal resistance by the victim) amounts to "physical force," which this Court has defined as "*violent* force." *Curtis Johnson*, 599 U.S. at 140. Again, that is purely a question of federal—not state—law about the meaning of the elements clause.

In that regard, the case for review of the federal question presented here is even more compelling than the question reviewed in *Curtis Johnson*. When the Court granted certiorari in *Curtis Johnson*, there was no clear and acknowledged circuit split on whether Florida simple battery satisfied the elements clause. *See* Brief of the Respondent in Opposition, *Johnson v. United States*, 2008 WL 5661843 at **8-10 (Dec. 24, 2008) (No. 08-6925). Instead, the circuits broadly disagreed on whether conduct common to many state battery offenses—i.e., a *de minimis* touching—qualified as

"physical force" under the elements clause. Similarly, as explained in the Petition and supplemental briefing here, the circuits broadly disagree now as well on whether conduct common to common-law robbery offenses—*e.g.*, bumping, grabbing, or minor struggling, which may or may not cause slight injuries—satisfies the definition of "physical force" adopted in *Curtis Johnson*. That there is also a clear circuit split on the precise state offense here (Florida robbery) makes review of the federal question presented vital to assure identically-situated defendants are not treated differently.

II. The Federal Question Dividing the Circuits Warrants Review

Although the question presented is one of federal law that admittedly divides the circuits, the government nonetheless insists that review is not warranted. Its assertions do not withstand scrutiny. The circuit conflict should be resolved.

1. As an initial matter, the government points out (BIO at 17) that the Court has recently denied several petitions raising the same question presented here. But, in the very same paragraph, the government acknowledges that these petitions were all denied *before* the Ninth Circuit's conflict-creating decision in *Geozos*. Moreover, the government does not dispute that, while of recent vintage, that conflict is already intractable. The Eleventh Circuit has followed its precedential decision in *Fritts* in scores of cases and shown no interest in reconsidering *Fritts* en banc. And the government declined to seek rehearing or certiorari in *Geozos*. Thus, moving forward, geography alone will determine whether a Florida robbery offense satisfies the ACCA's elements clause. Geography will determine whether certain federal defendants will be subject to an enhanced mandatory minimum penalty of 15 years, 18 U.S.C. § 924(e), as opposed to the otherwise-applicable 10-year maximum, 18 U.S.C. § 924(a)(2). Only this Court can resolve that untenable disparity.

2. To minimize the stakes, the government asserts that Florida robbery's status as a violent felony lacks broad national importance. But the raw numbers refute that assertion. At present, there are no less than fifteen pending certiorari petitions—fourteen from the Eleventh Circuit, and one from the Fourth Circuit—raising this issue.[1] That conservative figure does not include the numerous petitions that were filed and denied before *Geozos*. Nor does it include the incalculable number of petitions that will be filed absent immediate intervention by this Court. Indeed, now that there is a direct circuit conflict on whether Florida robbery is a violent felony, the Court can expect an avalanche of petitions presenting the question.

Federal sentencing data supports that uncontroversial prediction. Following the invalidation of the ACCA's residual clause in *Samuel Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015), Florida has truly become the ACCA epicenter of the country. While the total number of ACCA sentences nationally has decreased somewhat without the residual clause, the percentage of the total originating from the Eleventh Circuit has increased. U.S. Sentencing Comm'n, *Interactive Sourcebook*.[2]

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[1] For the Eleventh Circuit petitions, see *Davis v. United States*, No. 17-5543 (petition filed Aug. 8, 2017); *Conde v. United States*, No. 17-5772 (petition filed Aug. 24, 2017); *Phelps v. United States*, No. 17-5745 (petition filed Aug. 24, 2017); *Williams v. United States*, No. 17-6026 (petition filed Sept. 14, 2017); *Everette v. United States*, No. 17-6054 (petition filed Sept. 18, 2017); *Jones v. United States*, No. 17-6140 (petition filed Sept. 25, 2017); *James v. United States*, No. 17-6271 (petition filed Oct. 3, 2017); *Middleton v. United States*, No. 17-6276 (petition filed Oct. 3, 2017); *Rivera v. United States*, No. 17-6374 (petition filed Oct. 12, 2017); *Shotwell v. United States*, No. 17-6540 (petition filed Oct.. 17, 2017); *Mays v. United States*, No. 17-6664 (petition filed Nov. 2, 2017); *Hardy v. United States*, No. 17-6829 (petition filed Nov. 9, 2017); *Pace v. United States*, No. 17-7140 (petition filed Dec. 18, 2017). For the Fourth Circuit petition, see *Orr v. United States*, No. 17-6577 (petition filed Oct. 26, 2017).

[2] The Commission's Interactive Sourcebook is available at https://isb.usec.gov/Login. These statistics are based on data found under "All Tables and Figures," in Table 22.

From 2013 through 2016, the Eleventh Circuit accounted for the most ACCA sentences by far in the country—approximately 25% of the total each year—with the three Florida Districts accounting for at least 75% of the ACCA cases in the Eleventh Circuit and 20% of the national total. *Id.* And, while 2017 statistics are not yet available, the Commission has confirmed that there were still over 300 ACCA sentences imposed in 2017, U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2017), with the Southern District of Florida remaining among the top five districts nationally in the number of felon in possession cases. U.S. Sent. Comm'n, *Quick Facts: Felon in Possession of a Firearm* 1 (2017).

With such a substantial number of ACCA cases nationwide originating in Florida, many of them will inevitably involve Florida robbery. Indeed, Florida has had a consistently high robbery rate—with over 20,000 robberies committed every year for the last four decades.[3] That is a lot of prior Florida robbery offenses available for use as ACCA predicates. More generally, the Sentencing Commission found in a 2015 study based on its 2014 data that robbery followed only traffic offenses, larceny, burglary, and simple assault as the most common prior offenses committed by armed career criminals nationally. U.S. Sent'g Comm'n, *Public Data Briefing: "Crime of Violence" and Related Issues*.[4] Of course, traffic offenses, larceny, and misdemeanor simple assaults will never qualify as "violent felonies." And, after this Court's recent clarification of the categorical approach and elimination of the residual clause, many burglary offenses no longer qualify as ACCA predicates. *See, e.g., Descamps v. United*

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[3] http://www.disastercenter.com/crime/flcrime.htm.

[4] http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf (Slide 30).

States, 570 U.S. 254, 133 S. Ct. 2276, 2292 (2013) (California); *United States v. Esprit*, 841 F.3d 1235, 1240 (11th Cir. 2016) (Florida). As a result, robbery is now likely the most commonly-used ACCA predicate nationwide. And nowhere is that more true than in Florida. Given the sheer number of ACCA cases in the Eleventh Circuit, and the substantial number of those cases involving Florida robbery, the question presented here is of national importance for those reasons alone.

3. But there is more. Contrary to the government's suggestion, this issue is by no means limited to the Eleventh Circuit. Florida has one of the most—if not the most—transient populations in the country.[5] That means people who commit crimes in Florida do not remain in Florida. The transient nature of Florida's population, coupled with the substantial number of robbery offenses committed there, explains why federal courts around the country (not merely in the Eleventh Circuit) have already considered—and will continue to consider—whether Florida robbery satisfies the elements clause. The issue crops up everywhere, from New York to Alaska.

Geozos itself illustrates that wide range. The defendant there was sentenced as an armed career criminal in Anchorage, Alaska based upon a prior Florida robbery. If that remote corner of the country is grappling with the issue, then no jurisdiction is immune. Moreover, courts in other jurisdictions have also concluded that Florida robbery is not a violent felony. *See, e.g.*, *United States v. Lee*, 2016 WL 1464118 at **6-7 (W.D.N.Y. 2016) (holding that "Florida's robbery statute is not a categorical match for the ACCA definition of "physical force," and cannot be an ACCA predicate). But while the Ninth Circuit and some district courts have carefully surveyed Florida law, others have uncritically followed the home-circuit decision in *Fritts*. *See, e.g.*,

[5] City-Data.com/forum/city-vs-city/794683-whats-most-transient-state-6.html.

United States v. Orr, 685 Fed. App'x 263, 265-66 (4th Cir. 2017) (arising out of North Carolina); *Gardner v. United States*, 2017 WL 1322150 at *2 (E.D. Tenn. 2017); *Wright v. United States*, 2017 WL 1322162 at *2 (E.D. Tenn. 2017). If not corrected, *Fritts* will continue to spill over and prejudice defendants far and wide.

Now that the Eleventh and Ninth Circuits have dug in, other courts will line up behind those two competing decisions. For example, in *United States v. Gabriel Lazaro Garcia-Hernandez*, Case No. 17-3027, the Eighth Circuit is currently reviewing an ACCA sentence imposed by a North Dakota district court predicated upon Florida robbery, where the district court reflexively followed *Fritts*, Case No. 4:14-cr-00076-DLH, DE 87 at 9 (D.N.D. July 18, 2017). On appeal, the appellant is urging the Eighth Circuit to follow the Ninth Circuit's intervening decision in *Geozos*, while the government will undoubtedly ask the Eighth Circuit to follow *Fritts*. Because the Eighth Circuit and others like it will merely choose between those two opinions, the government does not suggest that further percolation is necessary. Nor could it: the two positions to this straightforward dispute have been fully staked out by the Eleventh and Ninth Circuits. And this Court has frequently granted certiorari to resolve 1-1 splits in federal statutory interpretation cases, since nationwide uniformity in application of a federal statute is critical. *See, e.g.,, Nichols v. United States*, 136 S. Ct. 1113, 1117 (2016); *Hall v. United States*, 566 U.S. 506, 511 & n.1 (2012).

Furthermore, as explained above, the circuit conflict ultimately boils down to proper interpretation of the term "physical force" in § 924(e)(2)(B)(i), as defined in *Curtis Johnson*. Only this Court can resolve the dispute about what its decision means. And, absent immediate resolution, defendants on the wrong side of the circuit split—not only those in the Eleventh Circuit, but those in other courts that follow

Fritts—will continue to serve at least five additional years in prison beyond the statutory maximum. Timely petitions for collateral review filed after *Samuel Johnson* in such courts will continue to be incorrectly denied. And many more ACCA sentences predicated upon Florida robbery will become unchallengeable. Time is of the essence; there is no reason to delay.

Resolution of the elements clause issue here will not only impact ACCA cases on direct and collateral review. It will extend to several important enhancements under the Sentencing Guidelines, which contain an identical elements clause. *See* U.S.S.G. §§ 4B1.2(a)(1) (career offenders), 2K2.1 cmnt. n.1 (firearms), 2L1.2 cmnt. n.2 (immigration). And, if the Court declares 18 U.S.C. § 16(b) unconstitutionally vague in *Sessions v. Dimaya* (No. 15-1498) (re-argued Oct. 2, 2017), then the question here could impact immigration cases as well, since the elements clause in 18 U.S.C. § 16(a) is virtually identical to the ACCA's. Both the Eleventh and Ninth Circuits have a substantial number of immigration cases on their civil and criminal dockets. And should *Dimaya* eliminate § 16(b), the Ninth Circuit will be bound by *Geozos*, while the Eleventh Circuit will be bound by *Fritts*, in determining whether aliens with prior Florida robberies newly convicted of crimes (including illegal re-entry) were previously convicted of "aggravated felonies."

4. Lastly, resolving the question presented here will do more than resolve the intractable and far-reaching conflict on Florida robbery's status as a violent felony. It will also have the added bonus of providing much-needed guidance to the lower courts on how to apply *Curtis Johnson* to numerous other robbery offenses. As explained in the Petition (at 14-20) but ignored by the government, Florida is hardly unique in requiring an offender to "overcome victim resistance" to be found guilty of

robbery. The "overcoming resistance" element in the Florida statute derives from the common law, and a majority of states have retained a similar element in their robbery offenses. Moreover, as explained in the Petition (at 20-26) and Petitioner's First Supplemental Brief (at 1-3), many state courts—not only those in Florida—have interpreted an "overcoming resistance" element consistent with the common law.

On this point, the government acknowledges that the Fourth Circuit in *United States v. Gardner*, 823 F.3d 794 (4th Cir. 2016) and *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), as well as the Sixth Circuit in *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017), correctly recognized that state courts in North Carolina, Virginia, and Ohio have all held that conduct such as bumping the victim, grabbing a victim's hand or arm, and/or pulling the strap on a victim's purse against only slight resistance is not violent force. BIO at 15 ("In those cases, the degree of force required under state law was not sufficient to satisfy the ACCA's elements clause"). The government asserts that the outcomes in *Gardner*, *Winston*, and *Yates* "arise not from any disagreement about the meaning of 'physical force' under *Johnson*, but from differences in how States define robbery." BIO at 14, 16.[6] But whether or not these cases exacerbate the subsequent, admitted conflict between the Ninth and Eleventh Circuits, they show that numerous states have similar robbery offenses.[7] And because

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[6] Contrary to the government, the offenses at issue in the other circuit cases cited in the BIO at 15-16 are *not* "similar" to the unarmed robbery offenses in Florida, North Carolina, Virginia, and Ohio. Nor has Petitioner ever claimed that they are similar.

[7] One offense strikingly similar to Florida's robbery offense, which the Ninth Circuit has also considered (although the government has not), is Arizona robbery. *See United States v. Molinar*, ___ F.3d ___, 2017 WL 5760565 at *4 (9th Cir. Nov. 29, 2017) (Ariz. Rev. Stat. § 1904 did not meet the career offender elements clause because Arizona courts had not required the "overpowering force" element "to be violent in the sense discussed by the Supreme Court in *Johnson*;" they had recognized that if an article is

these offenses derive from the common law and include "overcoming resistance" as an element, they can be committed by conduct similar to that which satisfies Florida's "overcoming resistance" element—*e.g.*, bumping, grabbing, pulling the strap on a purse, etc.. As a result, any decision by the Court here would inevitably provide useful guidance to the lower courts on whether such minor uses of force satisfy *Curtis Johnson*'s definition of "*violent* force."

Such guidance is both necessary and overdue. Three full decades have passed since Congress amended the ACCA to include two different "violent felony" definitions. And during that time, burglary and robbery have remained the most common offenses used for ACCA enhancements under those definitions. This Court has granted certiorari in multiple ACCA cases to address various state burglary offenses. *E.g.*, *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243 (2016); *Descamps*, 570 U.S. 254; *James v. United States*, 550 U.S. 192 (2007); *Taylor v. United States*, 495 U.S. 575 (1990). But still, surprisingly, it has never addressed whether a state robbery conviction has satisfied the elements (or residual) clauses. That question looms large after elimination of the residual clause, since the elements clause has taken center stage in ACCA litigation. The Court expressly left open the Florida robbery elements-clause question in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016), observing only that reasonable jurists could debate it. The time has come for a definitive resolution.

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attached in some way, "so 'as to create resistance however slight,'" the offense becomes robbery;" thus, "minor scuffles," including those involving bumping or grabbing where the victim was not harmed, are "insufficiently violent to qualify as force under *Johnson*"); *United States v. Jones*, ___ F.3d ___, 2017 WL 6495827 (9th Cir. Dec. 15, 2017) (*Molinar*'s holding applied equally to whether Arizona armed robbery was a "violent felony" under the ACCA's elements clause).

III. This Case is an Ideal Vehicle

Because the recurring federal question presented here admittedly divides the circuits and is otherwise of national importance, the only question that remains is whether this case is an appropriate vehicle to decide it. It is. As noted at the outset, the government has conspicuously not argued that this case poses any "vehicle problems." And rightly so. Petitioner's case presents the ideal vehicle in which to resolve the admitted circuit conflict for multiple reasons.

The single issue Petitioner presents—*i.e.*, whether "overcoming resistance" in a Florida robbery offense categorically involves the use of "violent force" as defined in *Curtis Johnson*—was specifically pressed in the court of appeals. *See* Answer Brief of the Appellant, *United States v. Stokeling*, 2016 WL 6082197, at **18-28 (11th Cir. Oct. 17, 2016). The Eleventh Circuit rejected that argument based on its precedential decision in *Fritts*. And resolution of that issue will be outcome-determination for Petitioner, as his status as an armed career criminal depends upon his Florida unarmed robbery conviction. That status, plainly, will have serious practical consequences for Petitioner: if his ACCA enhancement is upheld, the district court on remand will be required to increase his original 73-month sentence to least 180 months, a difference of at least 9 years in prison. And resolving the issue here would similarly affect scores of other Eleventh Circuit defendants erroneously serving 15-year sentences (and longer) because of *Fritts*.

Finally, Petitioner's case poses no procedural or tangential issues that threaten to complicate, let alone obstruct, review. His case comes to this Court on direct (not collateral) review in an ACCA (not Guidelines) case. The ACCA enhancement here

does not depend upon an "armed" robbery, thus leaving aside any questions about the presence of a weapon. And Petitioner was convicted after the Florida Supreme Court's decision in *Robinson*, which clarified beyond all doubt that "overcoming resistance" is an element of the offense. In short, the question is squarely and cleanly presented here. The Court should decide it.

IV. The Decision Below is Wrong

Finally, the Eleventh Circuit's decision in *Fritts* is wrong. As explained by the Ninth Circuit in *Geozos*, the "Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." 870 F.3d at 901. The government does not dispute that *Fritts* overlooked that key point. Nor does it dispute that *Fritts* failed to consult the intermediate appellate decisions illuminating the scope of Florida's "overcoming resistance" element. That error infected its conclusion.

The government nonetheless argues that the robbery conduct described in those intermediate appellate decisions does in fact constitute "violent force" under *Curtis Johnson*. To do so, it sweepingly asserts that any degree of "[f]orce sufficient to prevail in a physical contest for possession of the stolen item" is violent, since prevailing in a struggle "could not occur through 'mere unwanted touching.'" BIO at 9; *see* BIO at 11 (advancing same argument in context of unpeeling someone's fingers). But that assertion is based on a misreading of *Curtis Johnson*. This Court did not hold that a "mere unwanted touching" established a floor, such that anything more than that satisfies the elements clause. The only conduct the Court was asked to

consider in that case was an unwanted touching. It does not logically follow that every type of conduct involving more force than mere contact with another is violent force.

Furthermore, the government incorrectly suggests that conduct "capable" of causing *any* pain or injury is violent force. That test lacks a meaningful limit. While *Curtis Johnson* defined the term "physical force" as "*violent* force—that is, force capable of causing pain or injury to another person," 559 U.S. at 140, both before and after that 15-word definition, the Court made clear that "violent force" was measured by the "degree" or "quantum" of force. *Id.* at 139, 140, 142 (referring to "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power"). The government's singular focus on the word "capable" ignores the explanation pervading the remainder of the opinion.

The only specific conduct *Curtis Johnson* mentioned as necessarily involving the requisite degree of force was a "slap in the face," since the force used in slapping someone's face would necessarily "inflict pain." 559 U.S. at 143. But beyond that single example of a classic battery by striking, the Court did not mention any other category of conduct that would inflict an "equivalent" degree of pain or injury to categorically meet its new "violent force" definition. The government posits that "[f]orce sufficient to prevail in a physical contest for possession of the stolen item" is "equivalent to 'a slap in the face.'" BIO at 9. But *Curtis Johnson* said no such thing. And bumping, grabbing, and unpeeling one's fingers do not require the same violence or degree of force as a slap in the face.

The government's sweeping position here is not only at odds with *Curtis Johnson* but *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405 (2014). There, the Court adopted the broader common-law definition of "physical force" for a

"misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), rather than *Curtis Johnson*'s "*violent* force" definition, reasoning that "domestic violence" encompasses a range of force broader than 'violence' *simpliciter*." *Id.* at 1411 n.4 (emphasis in original). Relevant here, the Court observed that "most physical assaults committed against women and intimates are relatively minor," and include "pushing, grabbing, [and] shoving." *Id.* at 1412 (citations omitted). The Court opined that such "[m]inor uses of force may not constitute 'violence' in the generic sense." *Id.* As one such "example," the Court pointed out that, in *Curtis Johnson*, it had cited "with approval" *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003), where the Seventh Circuit had noted that it was 'hard to describe . . . as 'violence'" "a squeeze of the arm [that] causes a bruise." *Id.*

That deliberate approval suggests that the dividing line between violent and non-violent "force" lies somewhere between a slap to the face and a bruising squeeze of the arm. On that view, certainly the "bump" (without injury) in *Hayes* would constitute similarly "minor" and thus non-violent force. The same is also true of unpeeling the victim's fingers without injury (*Sanders*), an abrasion-causing grabbing of an arm during a tug-of-war (*Benitez-Saldana*), and the "slight injury" to the victim's hand by grabbing money and tearing off a scab (*Winston Johnson*). Each of these "minor uses of force" was demonstrably sufficient to overcome a victim's "minor resistance" in a Florida robbery case. But just like the bruising squeeze to the arm discussed in *Castleman*, which actually resulted in a minor injury, they do not constitute "violence" in the generic sense. The government's assumption that minor injuries are themselves proof of "violent force" (BIO at 12-13) is not supported by *Curtis Johnson*, *Castleman*, or real-world experience.

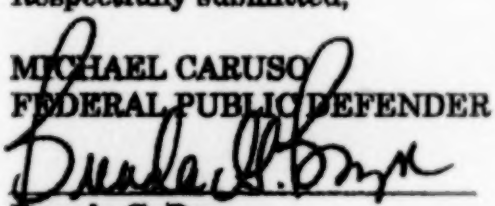
Finally, it is notable that Justice Scalia—writing only for himself—opined in *Castleman* that shoving, grabbing, pinching, and hair pulling would all meet the *Curtis Johnson* definition of "*violent* force," since (in his view) each of these actions was "capable of causing physical pain or injury." *Id.* at 1421-1422 (Scalia, J., concurring in the judgment). Significantly, however, no other member of the Court joined that view. That is so because such conduct—constituting more than an unwanted touch, but less than a painful slap to the face—entails only a minor use of force, not strength, vigor, or power. It thus lacks the degree of force necessary to qualify as violent. And because Florida robbery may unquestionably be committed by such conduct, it is not categorically a violent felony under the ACCA's elements clause.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition and the supplemental briefs, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 

Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
December 27, 2017

No. 17-5554

In The Supreme Court of the United States

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 4, 2017
Certiorari Granted April 2, 2018

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RELEVANT DOCKET ENTRIES

U.S. District Court
Southern District of Florida (Miami)
CRIMINAL DOCKET FOR CASE #:
1:15-cr-20815-JLK All Defendants

Case title: USA v. Stokeling Date Filed: 10/20/2015

Assigned to: Senior Judge James Lawrence King
Referred to: Magistrate Judge Edwin G. Torres

Date Filed	#	Docket Text
10/20/2015	1	INDICTMENT as to Denard Stokeling (1) count(s) 1 and the FORFEITURE. (ra) (Entered: 10/20/2015)
		* * * *
03/02/2016	30	FACTUAL PROFFER STATEMENT as to Denard Stokeling (dgj) (Entered: 03/02/2016)
03/02/2016	31	Minute Order for proceedings held before Magistrate Judge Barry L. Garber: Change of Plea Hearing as to Denard Stokeling held on 3/2/2016 Denard Stokeling (1) Guilty Count 1. Defendant remanded into USM custody. Court Reporter: Glenda Powers, 305-523-5022 / Glenda_Powers@flsd.uscourts.gov. Signed by Magistrate Judge Barry L. Garber on 3/2/2016. (dgj) (Entered: 03/02/2016)
03/03/2016	32	REPORT AND RECOMMENDATIONS on Plea of Guilty as to Denard Stokeling. Signed by Sr. Magistrate Judge

Barry L. Garber on 3/3/2016. (km01) (Entered: 03/03/2016)

* * * *

04/20/2016 36 OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT by Denard Stokeling (Abrams, Stewart) (Entered: 04/20/2016)

* * * *

04/26/2016 38 FINAL Addendum 2 Disclosure of Presentence Investigation Report of Denard Stokeling. This is a limited access document. Report access provided to attorneys Daya Nathan, Stewart Glenn Abrams by USPO (Attachments: # 1 Addendum, # 2 Addendum-Second)(dms) (Entered: 04/26/2016)

04/26/2016 39 RESPONSE to 36 Objections to Presentence Investigation Report by USA as to Denard Stokeling (Nathan, Daya) (Entered: 04/26/2016)

04/27/2016 40 NOTICE *of Filing Prior Convictions* by USA as to Denard Stokeling re 39 Response to Objections to Presentence Investigation Report, 36 Objections to Presentence Investigation Report (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C)(Nathan, Daya) (Entered: 04/27/2016)

04/28/2016 41 Minute Entry for proceedings held before Senior Judge James Lawrence King: Sentencing held on 4/28/2016

as to Denard Stokeling Court Reporter: Glenda Powers, 305-523-5022 /Glenda_Powers@flsd.uscourts.gov. (jw) (Entered: 04/28/2016)

* * * *

04/28/2016 44 JUDGMENT as to Denard Stokeling (1), Count(s) 1, Imprisonment 73 months to run concurrent with State case no. F15017823; Supervised Release 24 months; Assessment: $100.00; Closing Case for Defendant. – Motions terminated: 32 REPORT AND RECOMMENDATIONS on Plea of Guilty as to Denard Stokeling. Signed by Senior Judge James Lawrence King on 4/28/2016. (ls)

NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69. (Entered: 04/28/2016)

05/19/2016 45 TRANSCRIPT of Sentencing Hearing as to Denard Stokeling held on April 28, 2016 before Senior Judge James Lawrence King, 1-27 pages, Court Reporter: Glenda Powers, 305-523-5022 /Glenda_Powers@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by

contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/13/2016. Redacted Transcript Deadline set for 6/23/2016. Release of Transcript Restriction set for 8/22/2016. (gps) (Entered: 05/19/2016)

05/23/2016 46 NOTICE OF APPEAL by USA as to Denard Stokeling Re: 44 Judgment,,. Filing fee $ 505.00.. USA/FPD Filer – No Filing Fee Required. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Nathan, Daya) (Entered: 05/23/2016)

* * * *

06/01/2016 50 TRANSCRIPT of Change of Plea Hearing as to Denard Stokeling held on March 2, 2016 before Magistrate Judge Barry L. Garber, 1-15 pages, Court Reporter: Glenda Powers, 305-523-5022 / Glenda_Powers@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After

that date it may be obtained through PACER. Redaction Request due 6/27/2016. Redacted Transcript Deadline set for 7/8/2016. Release of Transcript Restriction set for 9/2/2016. (gps) (Entered: 06/01/2016)

* * * *

05/05/2017 57 MANDATE of USCA, We VACATE Stokelings sentence and REMAND for resentencing. as to Denard Stokeling re 46 Notice of Appeal – Final Judgment,; Date Issued: 5/5/17; USCA Case Number: 16-12951-CC (hh) (Entered: 05/05/2017)

05/09/2017 58 ORDER as to Denard Stokeling re 57 USCA Mandate, as to 57 USCA Mandate and Setting Re-Sentencing Hearing. (Re-Sentencing set for 8/1/2017 10:00 AM in Miami Division before Senior Judge James Lawrence King in Courtroom II, Eleventh Floor.) Signed by Senior Judge James Lawrence King on 5/9/2017. (jw) (Entered: 05/09/2017)

* * * *

07/25/2017 68 FINAL Addendum 3 Disclosure of ACCA Presentence Investigation Report of Denard Stokeling. This is a limited access document. Report access provided to attorneys Daya Nathan, Stewart Glenn Abrams by USPO (Attachments: # 1 Addendum-First, # 2 Addendum-Second, # 3 Addendum-Third)(fmi) (Entered: 07/25/2017)

* * * *

03/12/2018	76	ORDER Granting Request to Postpone Re-Sentencing as to Denard Stokeling Signed by Senior Judge James Lawrence King on 3/12/2018. (jw) (Entered: 03/12/2018)
04/06/2018	77	STATUS REPORT *(Joint)* by USA as to Denard Stokeling (Nathan, Daya) (Entered: 04/06/2018)

RELEVANT DOCKET ENTRIES

United States Court of Appeals for the Eleventh Circuit

Court of Appeals **Docketed:** 05/24/2016
Docket #: 16-12951 **Termed:** 04/06/2017
USA v. Denard Stokeling
Appeal From:
Southern District of Florida

05/24/2016	CRIMINAL APPEAL DOCKETED. Notice of appeal filed by Appellant USA on 05/23/2016.
08/18/2016	Appellant-Cross Appellee's Brief filed by Appellant USA.
08/18/2016	Appendix filed [1 VOLUMES] by Appellant USA.
10/17/2016	Appellee's Brief filed by Appellee Denard Stokeling.
10/27/2016	Reply Brief filed by Appellant USA.
11/09/2016	Supplemental Authority filed by Appellant USA.
02/06/2017	Supplemental Authority filed by Appellant USA.
03/20/2017	Supplemental Authority filed by Appellee Denard Stokeling.
04/06/2017	Submitted on the briefs without oral argument.
04/06/2017	Opinion issued by court as to Appellant USA. Decision: Vacated and Remanded.

04/06/2017	Judgment entered as to Appellant USA.
05/05/2017	Mandate issued as to Appellant USA.
06/15/2017	Extension for filing certiorari GRANTED by U.S. Supreme Court as to Appellee Denard Stokeling.
08/09/2017	Notice of Writ of Certiorari filed as to Appellant USA. SC# 17-5554.
04/02/2018	Writ of Certiorari filed as to Appellee Denard Stokeling is GRANTED. SC# 17-5554.

Case 1:15-cr-20815-JLK
Document 40-1
Entered on FLSD Docket 04/27/2016

EXHIBIT A

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. ☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY FLORIDA.		
DIVISION ☒ CRIMINAL ☐ OTHER	**JUDGMENT** ☐ Probation Violator ☐ Community Control Violator ☐ Retrial ☐ Resentence	**CASE NUMBER** 96-11220
THE STATE OF FLORIDA VS. DENARD STOKELING **PLAINTIFF DEFENDANT**		**CLOCK IN** [FILED OCT 07 1997 PANEQUE CLERK]

The Defendant, DENARD STOKELING, being personally before this court represented by I. ORTA-RODRIGUEZ, his attorney of record, and the State represented by S. DEMOS, Assistant State's Attorney, and having:

☐ been tried and found guilty ☐ entered a plea of guilty ☒ entered a plea of nolo contendere to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE NO.	DEGREE OF CRIME	OBTS NO.
1	ROBBERY	812.13(2)(c)	2F	

and no cause being shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the

Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

[Recorded Stamp Omitted]

[Certification Stamp Omitted]

Standard B

Defendant Denard Stokeling Case Number F96-11220

CHARGES/COSTS

The Defendant is hereby ordered to pay the following sum if checked:

- ☒ Fifty dollars ($50.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund).
- ☒ Five dollars ($5.00) as a court cost pursuant to F.S. 943.25(3) $3.00, F.S. 943.25(13) $2.00 (Criminal Justice Trust & Education Funds).
- ☐ A fine in the sum of $ _____ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as a part of a sentence to F.S. 775.083 are to be recorded on the Sentence page(s)).
- ☐ Twenty dollars ($20.00) pursuant to F.S. 939.015 (Handicapped and Elderly Security Assistance Trust Fund).
- ☐ A 10 percent surcharge in the sum of $ _____ pursuant to 775.0836 (Handicapped and Elderly Security Assistance Trust Fund).
- ☒ A sum of $ 200.00 pursuant to 27.3455 (Local Government Criminal Justice Trust Fund).
- ☐ Restitution in accordance with attached order.

☒ Three dollars ($3.00) Juvenile Assessment Center pursuant to Dade County Ordinance 96-182, F.S. incorporating F.S. 775.0833. ☒ A sum of $ WAIVED pursuant to F.S. 27.52 (Public Defender Application Fee). ☐ Other _____
[Fingerprints And Social Security Number Of Defendant Omitted]
I HEREBY CERTIFY that the above and foregoing are the fingerprints of the Defendant, TRUE COPY CERTIFICATION ON LAST PAGE and that they were placed thereon by said Defendant in my presence in Open Court this date, and that the defendant either ☐ provided the above-mentioned social security number OR ☐ was unable or unwilling to provide his/her social security number.
DONE AND ORDERED in Open Court in Dade County, Florida this 26th day of SEPTEMBER, 1997. [Signature] JUDGE ROBERTO M. PINEIRO

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.			
CRIMINAL DIVISION	**SENTENCE (AS TO COUNT 1)**		**CASE NUMBER** 96-11220 **OBTS NUMBER** ____
THE STATE OF FLORIDA PLAINTIFF **VS.** DENARD STOKELING **DEFENDANT**			**CLOCK IN** [FILED OCT 07 1997 PANEQUE CLERK]

The defendant, being personally before this Court, accompanied by his attorney, I. ORTA-RODRIGUEZ and having been adjudicated guilty herein, and the Court having given the defendant an opportunity to be heard and offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown and the Court having:

(Check one)
- ☐ on _____ deferred imposition of sentence until this date.
- ☐ previously entered a judgment in this case on the defendant now resentences the defendant.
- ☐ placed the defendant on Probation/ Community Control and having subsequently revoked the defendant's Probation/ Community Control.

IT IS THE SENTENCE OF THE COURT that the defendant:

- ☐ pay a fine of $ _____, pursuant to F.S. 775.083, plus $ _____ as the 5% surcharge required by F.S. 960.25.
- ☒ is hereby committed to the custody of the Department of Corrections.
- ☐ is hereby committed to the custody of the Sheriff of Dade County, Florida.
- ☐ is sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one; unmarked sections are inapplicable)

- ☐ for a term of Natural Life.
- ☒ for a term of TWELVE (12) YEARS.
- ☐ said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.
- ☐ IT IS FURTHER ORDERED that the entry of sentence be suspended as to count(s) of this case.

Defendant
DENARD STOKELING

OTHER PROVISIONS Case Number 96-11220

RETENTION OF JURISDICTION

_____ The Court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).

JAIL CREDIT

__X__ It is further ordered that the Defendant shall be allowed a total of 471 days as credit for time incarcerated prior to imposition of this sentence.

PRISON CREDIT

_____ It is further ordered that the Defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

CONSECUTIVE/
CONCURRENT AS TO
OTHER COUNTS

_____ It is further ordered that the sentence imposed for count(s) _____ shall run (check one) ☐ consecutive to ☐ concurrent with the sentence set forth in count(s) _____ of this case.

CONSECUTIVE/
CONCURRENT AS TO
OTHER CONVICTIONS

__X__ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐ consecutive to ☒ concurrent with the following:

_____ Any active sentence being served.

__X__ Specific sentences: 97-1221 & 97-14434

_____

_____

BLOOD SAMPLE REQUIRED

____ It is further ordered, pursuant to section 943.325, Florida Statutes, that the defendant, having been convicted of an attempt or offense under section 794 (sexual battery), 800 (lewdness or indecent exposure), 782.04 (murder), 784.045 (aggravated battery), 812.133 (car jacking), or 812.135 (home invasion robbery) shall be required to submit blood specimens.

In the event the above sentence is to the Department of Corrections, the Sheriff of Dade County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes.

The defendant in Open Court was advised of his right to appeal from this sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

In imposing the above sentence, the Court further recommends TRUE COPY CERTIFICATION ON LAST PAGE

DONE AND ORDERED in Open Court at Dade County, Florida, this 26th day of SEPTEMBER, 1997.

[Signature]
JUDGE ROBERTO M. PINEIRO

[Official Record Book/Page(s) Omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

F007
F96-11220

(Filed Apr. 11, 1996)

THE STATE OF FLORIDA v.	**INFORMATION FOR**
DENARD STOKELING	1. ROBBERY 812.13(2)(c) Fel. 2D

Defendant

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

JOAN HOLTZ, Assistant State Attorney of the Eleventh Judicial Circuit, on the authority of **KATHERINE FERNANDEZ RUNDLE**, State Attorney, prosecuting for the state of Florida, in the County of Dade, under oath, information makes that:

jh:jh 04/03/96
Juvenile Direct File
Do Not Issue Capias EXTRADITION 3
(A) Court Case #: J94013755B,
Police Case #: 366301R,B /M, DOB: [redacted],
SS#[redacted]
Case No: [F96-11220
J/ Judge Maynard Gross
Levine (J014) 5/2 @ 9:00 AM.]

COUNT 1

DENARD STOKELING, on or about JULY 17, 1994, in the County and State aforesaid, did unlawfully, by force, violence, assault, or putting in fear, take certain property, to wit: JEWELRY, said property being the subject of larceny, and of the value of less than THREE HUNDRED DOLLARS ($300.00), the property of KIMBERLY HENDRICKSON, as owner or custodian, from the person or custody of KIMBERLY HENDRICKSON, with the intent to temporarily or permanently deprive the above-named owner(s) or custodian(s) of the said property, in violation of s. 812.13(2)(c), Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA, COUNTY OF DADE:

Personally known to me and appeared before me, the Assistant State Attorney of the Eleventh Judicial Circuit of Florida whose signature appears below, being first duly sworn, says that the allegations set forth in this Information are based upon facts which have been sworn to as true by a material witness or witnesses, and which if true, would constitute the offenses therein charged, and that this prosecution is instituted in good faith.

/s/ Joan Holtz
Assistant State Attorney
Florida Bar # [327328]
1350 NW 12 Ave.,
Miami, FL (305) 547-0100

Sworn to and subscribed before me this 4 day of April, 1996

By: /s/ Beverly Radley
Deputy Clerk for Clerk of
the Courts, or
Notary Public

[Notary Stamp]

[SEAL]

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	**Case Number – 1:15-20815-CR-KING-001**
DENARD STOKELING	USM Number: 08673-104
	Counsel For Defendant: Stewart G. Abrams, AFPD Counsel For The United States: Daya Nathan, AUSA Court Reporter: Glenda Powers

The defendant pleaded guilty to Count One of the Indictment.

The defendant is adjudicated guilty of the following offense:

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1) and 924(e)	Possession of a firearm and ammunition by a convicted felon	August 27, 2015	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
4/28/2016

James Lawrence King
JAMES LAWRENCE KING
United States District Judge

April 28, 2016

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **SEVENTY-THREE (73) Months to run concurrent with State case no. F15017823**.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a State of Florida facility.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **TWO (2) Years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of

release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Permissible Search – The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment – The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[DO NOT PUBLISH]

No. 16-12951

D.C. Docket No. 1:15-cr-20815-JLK-1

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

DENARD STOKELING,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 6, 2017)

Before WILLIAM PRYOR, MARTIN, and BOGGS,* Circuit Judges.

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* Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

This appeal presents the question whether a conviction for Florida robbery, Fla. Stat. § 812.13, from before Florida passed a "robbery by sudden snatching" statute in 1999, Fla. Stat. § 812.131, categorically qualifies as a violent felony under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The district court did not enhance the sentence of Denard Stokeling under the Act because it held that his robbery conviction was not a violent felony. The United States appealed. Stokeling argues that before 1999, Florida robbery included robbery by sudden snatching, so it did not always require sufficient force to constitute a violent felony. But this argument is foreclosed by our precedents. *E.g.*, *United States v. Fritts*, 841 F.3d 937, 943-44 (11th Cir. 2016). We vacate and remand.

We have held many times that a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the Act, even if it occurred before 1999. *See, e.g.*, *id.* at 938, 943-44 (conviction from 1989); *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) (conviction from 1974). And in *Fritts*, we specifically rejected the argument that the sudden-snatching statute changed the elements of Florida robbery. 841 F.3d at 942-44. We explained that the Florida Supreme Court has held that Florida robbery "has *never* included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to

sustain a robbery conviction." *Id.* at 942. "Th[e] new sudden snatching statute was apparently needed *because* . . . []robbery [] did not cover sudden snatching where there was no resistance by the victim and no physical force to overcome it." *Id.* at 942 n.7 (emphasis added).

Our precedents apply to Florida robbery as well as armed robbery because the elements are identical, differing only in what "the offender carried" "in the course of committing the robbery." Fla. Stat. § 812.13. Our precedents rely on the shared force element in section 812.13(1) and do not mention the additional requirements for armed robbery in section 812.13(2). For example, this Court is bound by *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), which held that "Florida robbery is categorically a crime of violence under the elements of even the least culpable of these acts criminalized by Florida Statutes § 812.13(1)." *Fritts*, 841 F.3d at 941. Stokeling cannot circumvent this holding, even if he presents arguments the prior panel did not consider. *See Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006).

The district court also applied the incorrect method to determine whether a conviction is a violent felony under the Act. The parties agree that the district court erroneously looked to the underlying facts of Stokeling's crime. But the district court should have applied the "categorical approach," which "look[s] only to the elements of the crime, not the underlying facts of the conduct," *United States v. Braun*, 801 F.3d 1301, 1304-05 (11th Cir. 2015).

The force element of Florida robbery satisfies the elements clause of the Act. The Act defines a violent felony as any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). An element of Florida robbery is "the use of force, violence, assault, or putting in fear," Fla. Stat. § 812.13, which requires "resistance by the victim that is overcome by the physical force of the offender." *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997).

We **VACATE** Stokeling's sentence and **REMAND** for resentencing.

MARTIN, Circuit Judge, concurring:

I agree with the majority that our Circuit precedent dictates that Mr. Stokeling's prior robbery conviction under Fla. Stat. § 812.13 qualifies as a violent felony as that term is defined by the elements clause of the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e). *See United States v. Fritts*, 841 F.3d 937, 943-44 (11th Cir. 2016). However, I believe *Fritts* was wrongly decided.

The *Fritts* panel did not engage in the categorical analysis the Supreme Court instructed us to use when deciding whether a person's prior conviction requires a longer sentence under ACCA. When it turned its back on the required categorical approach, the *Fritts* panel failed to give proper deference to *McCloud v. State*, 335 So. 2d 257 (Fla. 1976), the controlling Florida Supreme

Court case interpreting § 812.13 from 1976 to 1997. In *McCloud*, Florida's highest court held that taking by "*any degree of force*" was sufficient to justify a robbery conviction. *Id.* at 258-59 (emphasis added). The result of the mistakes in *Fritts* is that people like Mr. Fritts will serve longer prison sentences that are not authorized by law. Although Mr. Stokeling is not one of those people (he was convicted after the Florida Supreme Court decided *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), which abrogated *McCloud*'s "any degree of force" holding), our reliance on *Fritts* here gives me the opportunity to talk about what went wrong in that case and why it matters.

I.

The ACCA caps a federal prison sentence for a felon in possession of a firearm at ten years. 18 U.S.C. § 924(a)(2). That is except when the felon has three or more felony convictions, *and* those felonies are violent or are otherwise serious crimes, his sentence cannot be less than fifteen years. *Id.* § 924(e). The ACCA defines "violent felony" in more than one way. *Id.* § 924(e)(2)(B). The Supreme Court has told us that one of those definitions – the "residual clause" – is unconstitutionally vague. *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551, 2557-58 (2015). As a result, a person's prior robbery conviction can serve as a basis for an ACCA sentence enhancement only if it meets another definition of "violent felony" from what is known as ACCA's "elements clause." 18 U.S.C. § 924(e)(2)(B)(i) ("As used in this subsection . . . the term 'violent

felony' means any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another."). So a prior robbery conviction can serve as an ACCA predicate only if it has "as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.*

When deciding whether a person's prior conviction qualifies as one requiring a longer sentence under ACCA, courts must first apply what is called the formal categorical approach. Under this approach, we do not look at the facts that resulted in the earlier conviction. *Descamps v. United States*, 570 U.S. ___, 133 S.Ct. 2276, 2283 (2013). Instead, Supreme Court precedent requires us to look only to the elements of the statute under which the person was convicted. *See Mathis v. United States*, 579 U.S. ___, 136 S.Ct. 2243, 2251 (2016). We must decide whether, in order to be convicted under a given statute, a person was required to use, attempt to use, or threaten to use physical force against another person.

In keeping with this, I will apply the formal categorical approach to decide whether a conviction under § 812.13 counts as a violent felony under the ACCA. If a defendant could have been convicted under § 812.13 without the use, attempted use, or threatened use of "*violent* force," *Curtis Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 1271 (2010) (interpreting "physical force" in the elements clause), or a "substantial degree of force," *United States v. Owens*, 672 F.3d

966, 971 (11th Cir. 2012) (holding that second-degree rape in Alabama doesn't require "physical force" as defined by *Curtis Johnson*), against another person, then that defendant's prior conviction under § 812.13 can't be a "violent felony" under the ACCA's elements clause.

In recent years, the Supreme Court has clarified the analytical steps that make up the formal categorical approach. In taking that approach, we must first "presume that the conviction rested upon nothing more than the least of the acts criminalized" by the state statute. *Moncrieffe v. Holder*, 569 U.S. 184, 133 S.Ct. 1678, 1684 (2013) (alterations adopted and quotation omitted). This is often referred to as the "least culpable conduct." *See Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1283 (11th Cir. 2013) (citing *Moncrieffe*, 133 S.Ct. at 1685). To identify the least culpable conduct criminalized by the statute, we look to the state courts' interpretations of the statute. *See Curtis Johnson*, 559 U.S. at 138, 130 S.Ct. 1265 ("We are [] bound by the Florida Supreme Court's interpretation of state law . . . in determining whether a felony conviction for battery under Fla. Stat. § 784.03(2) meets the definition of 'violent felony' in 18 U.S.C. § 924(e)(2)(B)(i)."); *see also United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012) ("[W]e look to Florida case law to determine whether a conviction under § 787.02 necessarily involves the employment of 'physical force' as that term is defined by federal law."). And as part of this step, we have to analyze "the version of state law that the defendant was actually convicted of violating."

McNeill v. United States, 563 U.S. 816, 821, 131 S.Ct. 2218, 2222 (2011).

Second, after identifying the least culpable conduct, we then have to figure out whether "those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S.Ct. at 1684 (alteration adopted). In the elements clause context, this means we examine whether the least culpable conduct involved the use, attempted use, or threatened use of violent force or a substantial degree of force. If it didn't, then under the formal categorical approach, the defendant's earlier conviction is *not* a violent felony.

II.

These recent Supreme Court cases tell us that a § 812.13 unarmed robbery conviction sustained while *McCloud* was controlling Florida law does not fall within the ACCA's elements clause. First, heeding the Supreme Court's instruction that we should "turn[] to the version" of § 812.13 that a defendant was "actually convicted of violating," *McNeill*, 563 U.S. at 821, 131 S.Ct. at 2222, we must look to what the Florida state courts said about the conduct that could support a robbery conviction under § 812.13 at the time the defendant was convicted. More to the point, we must look to how Florida courts defined the least culpable conduct – in this case, the smallest degree of force – sufficient to support a § 812.13 robbery conviction at that time.

Section 812.13 defines robbery as the taking of money or property with intent to deprive when "in the

course of the taking there is the use of force, violence, assault, or putting in fear." From 1976 to 1997, the controlling precedent from the Florida Supreme Court held that "[*a*]*ny* degree of force suffices to convert larceny into a robbery." *McCloud*, 335 So. 2d at 258 (emphasis added). So during that time period, Florida law was clear that conduct involving "any degree of force," like sudden snatching, was enough to justify a robbery conviction.

In keeping with the deference federal courts owe states' interpretations of their own criminal statutes, this Court has recognized and accepted Florida's view of what it took to sustain a conviction under the Florida robbery statute when *McCloud* was the controlling precedent. In *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), this Court used the formal categorical approach to determine that sudden snatching was the least culpable conduct that could support a 1996 Florida robbery conviction. *Id.* at 1311-12. This decision was necessary to *Welch*'s holding that the 1996 Florida robbery conviction was categorically a violent felony under the residual clause. *Id.* at 1313-14. Our precedent therefore binds us to *Welch*'s conclusion that sudden snatching was the least culpable conduct covered by § 812.13 when *McCloud* was the controlling Florida case defining that statute.

Having identified the least culpable conduct, we are next required to decide whether this conduct necessarily involves the use, attempted use, or threatened use of violent force or a substantial degree of force. It doesn't. Sudden snatching with "any degree of force,"

McCloud, 335 So. 2d at 258, plainly does not require the use of "a substantial degree of force." *Owens*, 672 F.3d at 971. Neither does it necessarily entail "*violent* force – that is, force capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140, 130 S.Ct. at 1271. This means a conviction for Florida unarmed robbery during the time *McCloud* was controlling should not count as a violent felony within the meaning of the elements clause.

III.

In reaching its (erroneous) conclusion that a 1989 armed robbery conviction under § 812.13 falls within the elements clause under the formal categorical approach, the *Fritts* panel sidestepped *McCloud*'s "any degree of force" holding by looking instead to our own court's previous decision in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011). *See Fritts*, 841 F.3d at 940-42. And when it did, that panel stretched *Lockley* well past its limits.

Lockley held that a 2001 Florida attempted robbery conviction under § 812.13(1) categorically counts as a "crime of violence" within the meaning of the identically-worded elements clause of the Sentencing Guidelines. *See* 632 F.3d at 1240-41, 1244-45. But *Lockley* looked to Florida law as it existed in 2001, when Mr. Lockley was convicted, and not as it existed in 1989, when Mr. Fritts was convicted. *Id.* at 1240 n.1, 1242. Again, the year of conviction matters because the least culpable conduct sufficient to support a robbery

conviction under Fla. Stat. § 812.13 changed in 1997. As I've set out above, the controlling Florida Supreme Court case from 1976 to 1997 (*McCloud*) held that conduct involving "any degree of force," was enough for a robbery conviction. 335 So. 2d at 258. However, in 1997 the Florida Supreme Court shifted course and held that robbery requires the perpetrator to use "more than the force necessary to remove the property from the person" – that is, "physical force" that "overcome[s]" the "resistance [of] the victim." *Robinson*, 692 So. 2d at 886.

A Florida robbery conviction could no longer be supported by "any degree of force" after the Florida Supreme Court decided *Robinson* in 1997. For that reason, the *Lockley* court correctly identified "[p]utting in fear" – and not sudden snatching – as the least culpable conduct in its categorical analysis of Mr. Lockley's 2001 attempted robbery conviction. 632 F.3d at 1244. But again, the Supreme Court has told us to look at what state courts required for a conviction at the time of that conviction. *See McNeill*, 563 U.S. at 821, 131 S.Ct. at 2222. And our 2011 federal court ruling doesn't change the fact that before the 1997 Florida Supreme Court ruling in *Robinson* the least culpable conduct for which someone could be convicted of robbery in Florida was sudden snatching with *any* degree of force. *Lockley* looked, as it should have, to a different time, so it did not apply to Mr. Fritts's appeal and has no bearing on any robbery convictions sustained while the Florida Supreme Court's 1976 ruling in *McCloud* was still good law.

The *Fritts* panel insisted that *Lockley* isn't limited to post-*Robinson* robberies – but instead applies to all Florida robberies – because § 812.13 has never included sudden snatching. *Fritts*, 841 F.3d at 943. As support, it pointed to language in *Robinson* suggesting that § 812.13 has always required more than sudden snatching. *Id.* It also emphasized that when the Florida Supreme Court interprets a Florida statute, "it tells us what that statute always meant." *Id.* But again, this reasoning ignores what the Supreme Court told us about how to conduct the categorical analysis.[1] *See McNeill*, 563 U.S. at 821, 131 S.Ct. at 2222 ("The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction."). *McCloud* was controlling Florida Supreme Court law from 1976 to 1997, and it said "any degree of force" could support a robbery conviction. 335 So. 2d at 258. Regardless of how the Florida Supreme Court characterized *McCloud* in its *Robinson* decision, there is no erasing the fact that conduct involving minimal force was prosecuted as robbery when *McCloud* was the controlling precedent. *See, e.g.*, *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986) (upholding a robbery conviction because robbery required only "ever so little" force).

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[1] It's generally true that when a court interprets a statute it tells us what the statute has always meant. But here our interest is not in divining the true meaning of § 812.13. Rather, our interest is in understanding what conduct could have resulted in convictions under the statute between 1976 and 1997, even if Florida courts were misinterpreting the statute during that time.

Another problem with *Fritts*'s reliance on *Robinson* for the proposition that § 812.13 has never included sudden snatching is that it was plainly foreclosed by our own decision in *Welch*. In looking to the version of § 812.13 under which Mr. Welch was convicted, the *Welch* panel acknowledged and even discussed *Robinson*, but it did not adopt *Robinson*'s suggestion that sudden snatching had never been sufficient to support a conviction under § 812.13. *Welch*, 683 F.3d at 1311-12. Rather, it identified sudden snatching as the least culpable conduct for which a person could be convicted under the statute because Mr. Welch pleaded guilty in 1996 – before *Robinson* was decided. *Id.* And 1996 was "a time when the controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into a robbery." *Id.* at 1311 (quoting *McCloud*, 335 So. 2d at 258-59).

* * *

Fritts was wrong to suggest that *all* unarmed robbery convictions under Fla. Stat. § 812.13 are violent felonies as defined by ACCA's elements clause because use of "any degree of force" could support a § 812.13 conviction from 1976 to 1997. This mistake will continue to have enormous consequences for many criminal defendants who come before our Court. For that reason, and even though *Fritts*'s mistakes do not affect Mr. Stokeling, I feel compelled to explain the error in *Fritts*'s statement, relied on here by the majority, that § 812.13 "has *never* included a theft or taking by mere [sudden] snatching." *Fritts*, 841 F.3d at 942.

No. 17-5554

In The Supreme Court of the United States

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

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OPINIONS AND ORDERS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit (J.A. 28-40) is unpublished but reported at 684 F. App'x 870. The judgment of the district court (J.A. 20-27) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit issued its decision on April 6, 2017, and Justice Thomas extended the time to file a petition for a writ of certiorari to August 4, 2017. The petition was timely filed that day and granted on April 2, 2018.

STATUTORY PROVISIONS INVOLVED

Under the Armed Career Criminal Act ("ACCA"), a "violent felony" is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

At the time of Petitioner's conviction in 1997, § 812.13 of the Florida Statutes provided:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the

money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt to commit robbery or in flight after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Additional statutory provisions relevant to this case are included in Appendix A.

INTRODUCTION

The Armed Career Criminal Act ("ACCA") mandates at least 15 years in prison and permits a sentence of up to life for individuals convicted of certain firearm possession offenses normally subject to a 10-year maximum. 18 U.S.C. §§ 922(g), 924(a)(2), (e). Given the ACCA's harsh penalties, Congress targeted only the most dangerous of these offenders by reserving the ACCA enhancement for those with three prior "violent felon[ies]" or "serious drug offense[s]." 18 U.S.C. § 924(e)(2). In Congress' view, such a criminal history reflects "an increased likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger." *Begay v. United States*, 553 U.S. 137, 146 (2008). The question presented here is whether the Florida offense of unarmed robbery is a qualifying "violent felony."

In *Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), this Court declared unconstitutionally vague one of the ACCA's three "violent felony" definitions. Known as the "residual clause," that amorphous definition had emerged over time as a capacious catchall, sweeping in garden-variety property crimes, including petty theft and non-forceful robbery offenses. In one case, a court of appeals even held that "theft of over $5 in money or goods from another person—in

other words, pickpocketing"—satisfied the residual clause, prompting the eventual author of *Samuel Johnson* to deride the "apparent view that Oliver Twist was a violent felon." *Derby v. United States*, 564 U.S. 1047, 131 S. Ct. 2858, 2859 (2011) (mem.) (Scalia, J., dissenting from denial of certiorari) (citing *United States v. Jarmon*, 596 F.3d 228 (4th Cir. 2010)).

While *Samuel Johnson* ultimately excised the residual clause, it left intact the ACCA's two remaining "violent felony" definitions. 135 S. Ct. at 2563. One enumerates a handful of "violent felon[ies]," but robbery is not among them. 18 U.S.C. § 924(e)(2)(B)(ii). The other, known as the "elements clause," encompasses felonies that have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). For a robbery offense to qualify as an ACCA predicate today, it must satisfy that definition. In stark contrast to the ACCA's inscrutable residual clause, the elements clause is circumscribed, intelligible, and amenable to judicial interpretation.

Indeed, this Court authoritatively interpreted the elements clause in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). Applying ordinary tools of statutory construction, the Court found it "clear" from both the text and context that the phrase "physical force" in the ACCA requires "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The Court explained that "*violent* force" "connotes a substantial degree of force"—*i.e.*, "extreme" force, "strong physical force," "the exertion of great

physical force or strength," or force that is "furious; severe; vehement." *Id.* (quoting Webster's New International Dictionary 2846 (2d ed. 1954); 19 Oxford English Dictionary 656 (2d ed. 1989); and Black's Law Dictionary 1706 (9th ed. 2009)).

This case calls for a straightforward application of *Curtis Johnson*. The Florida Supreme Court has repeatedly held that, to commit robbery in Florida, "[t]he degree of force used is immaterial," *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922), and "[a]ny degree of force suffices," *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976). Although the force used must overcome some resistance by the victim, *Robinson v. State*, 692 So. 2d 883, 886-87 (Fla. 1997), Florida law makes clear that the victim's resistance itself may be slight, requiring only a slight degree of force to overcome it. Accordingly, robbery can occur in Florida where a pickpocket caught in the act merely seeks to pull free from the victim's grasp. And robbery can also occur where the offender does no more than grab cash from someone's closed fist, tearing the bill without touching the person. The slight degree of force used in such cases falls well short of "*violent* force," as defined in *Curtis Johnson*.

The Court should not expand the elements clause to rebrand Oliver Twist a "violent felon." Imposing the ACCA enhancement based on garden-variety, petty criminal conduct would contravene both *Curtis Johnson* and the statute's purpose of preventing gun violence. Of course, "Congress remains free at any time" to revise the ACCA; for example, it might "add more crimes to its list," "write a new residual clause that

affords the fair notice lacking" before, or include felonies "carrying a prison sentence of a specified length." *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 1233 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). But unless and until Congress does so, faithfully applying the statutory text as interpreted by *Curtis Johnson* compels the conclusion that Florida robbery does not trigger the ACCA's enhanced penalties.

STATEMENT

1. In 2016, Petitioner pleaded guilty in the Southern District of Florida to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). In the pre-sentence investigation report ("PSI"), the probation officer recommended that Petitioner receive an enhanced sentence under the ACCA, subjecting him to a 15-year mandatory minimum and a maximum sentence of life. 18 U.S.C. § 924(e). The probation officer asserted the enhancement applied because Petitioner had three prior "violent felon[ies]," one of which was a 1997 Florida conviction for unarmed robbery under Fla. Stat. § 812.13. With the ACCA enhancement, Petitioner's advisory guideline range was 180-188 months. Without it, his advisory guideline range was 70-87 months, and his statutory maximum was 10 years. 18 U.S.C. § 924(a)(2).

Petitioner objected to the ACCA enhancement. He argued that his 1997 robbery conviction did not qualify as a "violent felony" under the ACCA's elements clause

because Fla. Stat. § 812.13 did not have as an element "physical force," 18 U.S.C. § 924(e)(2)(B)(i), which this Court had defined as "*violent* force" in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). Petitioner relied on Florida Supreme Court decisions establishing that, to commit robbery "by force" under Fla. Stat. § 812.13, "[t]he degree of force used is immaterial," *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922), and "[a]ny degree of force suffices," *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976).

In response, the government introduced the underlying charging document and judgment, reflecting that Petitioner's conviction was pursuant to Fla. Stat. § 812.13(2)(c), which prohibits robbery without a firearm or weapon. J.A. 9-19. Although that was the least serious form of robbery under the statute, the government argued that circuit precedent in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) foreclosed Petitioner's argument that his unarmed robbery conviction did not satisfy the elements clause. The government did not address Petitioner's argument as to the import of the Florida Supreme Court's decisions in *Montsdoca* and *McCloud*. Instead, it cited that court's later decision in *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), which adhered to *Monstdoca* and *McCloud* but emphasized that Florida robbery requires force necessary to overcome a victim's resistance. The government argued that the amount of force necessary to overcome resistance necessarily satisfied *Curtis Johnson*'s definition of "physical force."

The district court sustained Petitioner's objection to classifying his robbery conviction as a "violent felony," but on a different ground. Specifically, the court relied on the particular facts of Petitioner's robbery offense set forth in the PSI. J.A. 30. Without the ACCA enhancement, the 15-year mandatory minimum became a 10-year statutory maximum, and Petitioner's guideline range became 70-87 months. The court sentenced Petitioner to 73 months. J.A. 20-21.

2. The government appealed. It first argued that, because the Florida robbery statute was "indivisible" under *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016), the district court erred by examining the particular facts of Petitioner's offense instead of the statutory elements of robbery. Second, the government argued that binding circuit precedent, not only *Lockley* but also *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) (holding that Florida armed robbery qualified as a "violent felony"), confirmed that Petitioner's Florida unarmed robbery conviction categorically had "physical force" as an element. According to the government, *Robinson* supported that conclusion because Florida robbery requires force necessary to overcome the victim's resistance.

Petitioner responded that neither *Lockley* nor *Dowd* had considered any relevant Florida case law or determined the least culpable conduct, as this Court's precedents require. As a result, Petitioner argued, those circuit precedents were neither controlling nor persuasive. He underscored that, under Florida Supreme Court precedent, the degree of force necessary

to overcome resistance was "immaterial," *Montsdoca*, 93 So. at 159, and "[a]ny degree of force" sufficed for a robbery conviction, *McCloud*, 335 So. 2d at 258. And, he noted, post-*Robinson* case law in Florida confirmed that the victim's resistance could be slight, and only slight force is necessary to overcome slight resistance. In light of that case law, Petitioner argued that his offense did not categorically require "*violent* force" as an element, and the district court's ruling should be affirmed on that basis.

The court of appeals, however, accepted the government's arguments, vacated Petitioner's 73-month sentence, and remanded for re-sentencing with the ACCA enhancement. The court agreed with the government that the district court erred by considering the underlying facts of Petitioner's robbery offense; instead, it "should have applied the 'categorical approach,' which looks only to the elements of the crime." J.A. 30 (citation and brackets omitted). Applying that approach, the court held it was bound by circuit precedent, including the post-briefing decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), which held that *Lockley* and *Dowd* remained binding, and "a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA]." J.A. 29. Based on that precedent, and still without expressly considering *Montsdoca*, *McCloud*, or any post-*Robinson* Florida case law, the court held that "[t]he force element of Florida robbery satisfies the elements clause of the [ACCA]," because it "requires 'resistance by the victim that is overcome

by the physical force of the offender.'" J.A. 31 (quoting *Robinson*, 692 So. 2d at 886).

3. Petitioner sought a writ of certiorari. While his petition was pending, a unanimous panel of the Ninth Circuit expressly put itself "at odds with the Eleventh Circuit" by holding that Florida robbery is *not* a "violent felony" under the ACCA's elements clause. *United States v. Geozos*, 870 F.3d 890, 898-901 (9th Cir. 2017). From its review of Florida appellate case law, the Ninth Circuit found it "clear that one can violate section 812.13 without using violent force." *Id.* at 900. While acknowledging that "'there must be resistance by the victim that is overcome by the physical force of the offender,'" *id.* (quoting *Robinson*, 692 So. 2d at 886), the Ninth Circuit thought it "[c]rucial[ ]" that "the amount of resistance can be minimal," *id.* (citing *Mims v. State*, 342 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977) for the proposition that the victim may resist "*in any degree*"). In finding *Fritts* unpersuasive, the Ninth Circuit observed "that the Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, ha[d] overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159).

This Court granted certiorari. 584 U.S. ___, 138 S. Ct. 1438 (2018) (mem.).

SUMMARY OF ARGUMENT

Florida robbery is not a "violent felony" under the ACCA's elements clause.

The "categorical approach" governs the analysis. Under that familiar methodology, the Court considers only the elements of the offense, *Descamps v. United States*, 570 U.S. 254, 261 (2013), and must therefore assume the offense was committed in the least culpable manner criminalized by state law, *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013); *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010). If that least culpable conduct does not satisfy the elements clause, the offense is categorically overbroad and does not qualify as a "violent felony." Here, Florida robbery is categorically overbroad vis-à-vis the elements clause because it does not have "as an element" the use of "physical force." 18 U.S.C. § 924(e)(2)(B)(i). That conclusion is compelled by a straightforward application of the categorical approach, this Court's definition of "physical force" as "*violent* force," *Curtis Johnson*, 559 U.S. at 140, and an examination of substantive Florida law.

A. In *Curtis Johnson*, the Court defined "physical force" in the ACCA to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* (emphasis in original). The extensive explanation surrounding that definition makes clear that "*violent* force" requires a "substantial degree of force." *Id.* That means "an unusual degree of strength or energy," or an "extreme" degree of force that is "furious," "severe," "vehement," and "strong." *Id.* at 139-40

(citation and alterations omitted). In short, a heightened degree of force or power is required.

Focusing instead on a single word in the Court's definition, the government has suggested that "*violent* force" is any force potentially "capable" of causing pain or injury even in an outlier case. *See* Gov't Br. in Opposition ("BIO") 9, 11-12. But that all-inclusive view is incompatible with both the reasoning and result in *Curtis Johnson*. Indeed, *all* force is potentially capable of causing pain or injury in some situations, including the shoulder tap that *Curtis Johnson* deemed non-violent. The government's limitless view ignores the Court's repeated focus on "a substantial degree of force," and eliminates the distinction *Curtis Johnson* sought to draw between violent and non-violent force. When read alongside the extensive explanation surrounding it, the Court's "*violent* force" definition requires a degree of force reasonably expected to cause pain or injury. That contextual reading comports with "*violent* force" as a "substantial degree of force." And it also explains why *Curtis Johnson* indicated a slap in the face might involve "*violent* force," 559 U.S. at 143, but held a shoulder tap does not, *id.* at 137-39, 145.

The Court confirmed the correctness of that reading of *Curtis Johnson* in *United States v. Castleman*, 572 U.S. ___, 134 S. Ct. 1405 (2014). There, the Court reiterated that "*violent* force" "'connotes a substantial degree of force.'" *Id.* at 1410-11 (quoting *Curtis Johnson*, 559 U.S. at 140). And the Court indicated that "[m]inor uses of force," including "a squeeze of the arm that causes a bruise," would not satisfy *Curtis*

Johnson's definition. *Id.* at 1411-12 (quotation and brackets omitted).

B. Florida robbery lacks "*violent* force" as an element because it can be committed by using only a slight degree of force. Florida Supreme Court cases going back nearly a century establish that, to commit the offense of robbery, "[t]he degree of force is immaterial," *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922), and "[a]ny degree of force suffices," *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976). The only qualification is that the force must "overcome the victim's resistance." *Montsdoca*, 93 So. at 159; *see Robinson v. State*, 692 So. 2d 883, 886-87 (Fla. 1997). But that qualification does not require a substantial degree of force in every case, because Florida law "does not require that the victim of robbery resist to any particular extent." Fla. Std. Jury Instr. (Crim.) 15.1. Because the victim's resistance can be slight, only a slight degree of force is necessary to overcome it.

In holding that Florida robbery satisfies the ACCA's elements clause, the Eleventh Circuit failed to meaningfully scrutinize Florida law and therefore overlooked that proportional relationship. Several Florida cases illustrate that precise dynamic at work. For instance, robbery can be committed in Florida where a pickpocket caught in the act simply seeks to pull free from the victim's grasp. And it can also be committed where a person does no more than grab cash from someone's closed fist, tearing the bill but not touching the person. If the victim grips the cash (or the escaping pickpocket) loosely, or releases his grip after

only a moment of resistance, the slightest degree of force will transform a garden-variety petty theft into robbery. *See infra* Part B(3) (discussing Florida cases).

These Florida robbery examples do not involve the extreme, powerful, severe, strong, or vigorous force that *Curtis Johnson* requires. Rather than involving "a substantial degree of force," they require even less force than one of the "minor" uses of force *Castleman* said would not constitute "*violent* force": the bruising squeeze of the arm. The government acknowledged in its brief in opposition here that other courts of appeals had correctly held that shoving, bumping, and jerking a victim by the shoulder all involved non-violent force under *Curtis Johnson*. BIO 14-15. And that acknowledgement confirms that Florida robbery likewise does not require "*violent* force," since it may be committed by the same, and even less forceful, conduct. Because the shoving, bumping, and jerking at issue in the other circuit cases was potentially "capable" of causing pain or injury in an outlier case, the government's candid agreement—that the conduct in those cases did not involve "*violent* force"—further refutes its novel reading of *Curtis Johnson*.

C. The conclusion that Florida robbery is not a "violent felony" is not only compelled by this Court's precedents and substantive Florida law; it accords precisely with the "basic purposes" of the ACCA. *Begay v. United States*, 553 U.S. 137, 146 (2008). In *Begay*, the Court explained that Congress sought to mandate a severe 15-year sentence only for "a particular subset of offender[s]" who, based on their record of past crimes, are

increasingly likely to "deliberately point [a] gun and pull the trigger." *Id.* at 146-47. That increased likelihood of gun violence is absent here, because Florida robbery sweeps in conduct that is not designed to cause any harm. Indeed, the offense encompasses unsuccessful pickpockets and shoplifters who seek to avoid any physical confrontation and use force only to escape once caught. And it also encompasses those who do no more than grab cash out of someone's closed hand. Because such conduct is neither designed nor expected to cause any physical harm, it cannot plausibly serve as a predictor of gun violence. It would contravene the basic statutory purpose to mandate 15-year prison sentences based on such garden-variety, petty criminal conduct. Petitioner's sensible reading of *Curtis Johnson* avoids that incongruous result.

ARGUMENT

FLORIDA UNARMED ROBBERY IS NOT A "VIOLENT FELONY" UNDER THE ELEMENTS CLAUSE OF THE ARMED CAREER CRIMINAL ACT

The ACCA specifies a harsh mandatory minimum sentence for a broad array of individuals prohibited from possessing a firearm, including convicted felons, 18 U.S.C. § 922(g), who also have three prior "violent felon[ies]" or "serious drug offense[s]," 18 U.S.C. § 924(e). For those with such a criminal history, the ACCA transforms the otherwise-applicable 10-year statutory maximum penalty into a 15-year mandatory minimum

penalty and a maximum penalty of life. 18 U.S.C. §§ 924(a)(2), 924(e). In mandating this "stringent" penalty, Congress' "basic purpose[ ]" was to target "only a particular subset of offender"—namely, those whose criminal history demonstrates "an increased likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger." *Begay v. United States*, 553 U.S. 137, 139, 146-47 (2008).

The ACCA defines a "violent felony" as an offense that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The definitions in subsection (ii) are not at issue here. In *Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), the Court declared void for vagueness the latter half of subsection (ii), known as the "residual clause." And robbery is not one of the offenses enumerated in the first half of that subsection. Without subsection (ii), Florida robbery may qualify as a "violent felony" only under subsection (i), known as the "elements clause." *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1261 (2016).

To determine whether Florida robbery satisfies the elements clause, the Court employs the "categorical approach," under which it "may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps v. United States*, 570

U.S. 254, 261 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). If the statutory elements are the same as, or narrower than, the federal definition, the offense qualifies as a "violent felony." "But if the statute sweeps more broadly than" the federal definition, the offense "cannot count as an ACCA predicate, even if the defendant actually committed the offense" in a qualifying manner. *Descamps*, 570 U.S. at 261.

Due to this unwavering focus on the statutory elements of the offense, as opposed to the actual facts, the Court must "examine what the state conviction necessarily involved." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). To make that determination, the Court "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Id.* at 190-91 (quoting *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010) (brackets omitted)). And to determine the least culpable conduct for a state conviction, the Court must look to state law, since it is "fundamental to our system of federalism" that "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered" by the state courts. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Thus, while the "meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law," federal courts are "bound" by state courts' "interpretation of state law, including [their] determination of the elements" of the offense. *Curtis Johnson*, 559 U.S. at 138.

Of course, the "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be a 'realistic probability . . . that the State would apply its statute to conduct that falls outside'" the federal definition. *Moncrieffe*, 569 U.S. at 191 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). But to show such a probability, an offender need only point to a case "in which the state courts in fact did apply the statute" in an overbroad manner. *Duenas-Alvarez*, 549 U.S. at 193. Petitioner can easily make that showing here because, as explained below, several cases illustrate that Florida robbery can be committed without the type of "physical force" required by 18 U.S.C. § 924(e)(2)(B)(i). Florida robbery is therefore categorically overbroad vis-à-vis the ACCA's elements clause, and cannot qualify as a "violent felony."

A. In the ACCA, "Physical Force" Means "*Violent* Force"

In *Curtis Johnson*, the Court interpreted "physical force" in the ACCA to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140 (emphasis in original). The extensive explanation surrounding that definition, as well the Court's subsequent discussion in *United States v. Castleman*, 572 U.S. ___, 134 S. Ct. 1405, 1411-12 (2014), establishes that "*violent* force" requires a "substantial degree of force." *Curtis Johnson*, 559 U.S. at 140.

1. "*Violent* Force" Requires a "Substantial Degree of Force"

The Court in *Curtis Johnson* began by identifying the "ordinary meaning" of "physical force." 559 U.S. at 138. Citing both lay and legal dictionaries, the Court explained that the "general usage" of the term "force" "means strength or energy; active power; vigor; often an unusual degree of strength or energy; power to affect strongly in physical relations"; and "power" or "violence." *Id.* at 138-39 (quoting Webster's New International Dictionary 985 (2d ed. 1954), and Black's Law Dictionary 717 (9th ed. 2009) (brackets and quotation marks omitted)). Synthesizing the commonalities of these definitions, the Court observed that they all "suggest a degree of power that would not be satisfied by the merest touching." *Id.* at 139. Thus, the "ordinary meaning" of "force" in both common parlance and the law requires a heightened degree of power.

Given the context in which "physical force" is used in the ACCA, the Court adopted the ordinary meaning of "force." In doing so, the Court rejected the broader common law meaning of "force" proposed by the government, which would have encompassed "[t]he most nominal contact," such as a mere offensive touching. *Id.* at 138-40 (quotation omitted). The common law definition derived from common law *misdemeanor* battery; thus, the Court found, it was "a comical misfit with the defined term 'violent felony.'" *Id.* at 141-42, 145. By contrast, the "more general usage" of "force" fit well in the ACCA context. *Id.* at 139-40. The Court emphasized that it was "interpreting the phrase 'physical

force' as used in defining . . . the statutory category of 'violent felonies.'" *Id.* (citation and brackets omitted). In that regard, the Court relied on *Leocal v. Ashcroft*, 543 U.S. 1 (2004), where it had interpreted a "very similar" definition in 18 U.S.C. § 16(a), and stated, "'[W]e cannot forget that we ultimately are determining the meaning of the term crime of violence. The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes.'" *Curtis Johnson*, 559 U.S. at 140 (quoting *Leocal*, 543 U.S. at 11) (quotation marks omitted).

Emphasizing that "[u]ltimately, context determines meaning," *id.* at 139, the Court in *Curtis Johnson* found it "clear" that, in the "violent felony" context, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person," *id.* at 140. Immediately after articulating that definition, the Court confirmed that "*violent* force" is determined by the degree of force, explaining: "Even by itself, the word 'violent' . . . connotes a substantial degree of force." *Id.* As support, the Court again relied on several dictionaries, which defined "violent" as: "physical force, esp[ecially] by extreme and sudden or by unjust or improper force; furious; severe; vehement"; "the exertion of great physical force or strength"; and "strong physical force." *Id.* (quoting Webster's Second, *supra*, at 2846; 19 Oxford English Dictionary 656 (2d ed. 1989); and Black's Law Dictionary, *supra*, at 1706). The Court added: "When the adjective 'violent' is attached to the noun 'felony,'

its connotation of strong physical force is even clearer." *Id.*

Thus, both before and immediately after adopting its "*violent* force" definition, the Court confirmed that "*violent* force" involves a heightened degree of force. The Court even reiterated that understanding a final time, stating: "As we have discussed . . . the term 'physical force' itself normally connotes force strong enough to constitute 'power'—and all the more so when it is contained in a definition of 'violent felony.'" *Id.* at 142. Over the course of its analysis, the Court used the word "degree" four separate times. *See id.* at 139-43.

Ultimately, the Court gave concrete meaning to its "*violent* force" definition by applying it to the least culpable conduct in the case before it. The offense at issue in *Curtis Johnson* was Florida simple battery. Florida courts had construed that offense consistent with the common law, such that a battery could be committed "by *any* intentional physical contact, no matter how slight . . . such as a tap on the shoulder without consent." *Id.* at 138 (quotation marks, citations, and brackets omitted). Focusing exclusively on that nominal degree of force, the Court easily concluded that Florida simple battery, when committed by an offensive touching, did not satisfy its "*violent* force" definition. *See id.* at 139-43, 145.

2. The Government's "Capable" Test Disregards that "*Violent* Force" Requires a "Substantial Degree of Force"

The government seeks a dramatic expansion of *Curtis Johnson*. In its brief in opposition, it suggested that any conduct potentially "capable" of causing pain or injury is violent force. *See* BIO 9, 11-12. But that interpretation is not faithful to the Court's opinion. It ignores the extensive discussion surrounding *Curtis Johnson*'s "*violent* force" definition, including the Court's characterization of "*violent* force" as "a substantial degree of force." 559 U.S. at 140. Instead, the government improperly reads a single word in that definition ("capable") in isolation, without regard for the explanation elucidating it. This Court has cautioned that, when reading its decisions, statements must not be read "in isolation"; rather, they "must be evaluated alongside" the surrounding explanation. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 998 (2017). The government fails to heed that warning.

Not only does the government's interpretation render most of *Curtis Johnson* superfluous; it also lacks a limiting principle. After all, *any* degree of force is potentially "capable" of causing pain or injury under certain circumstances. Indeed, even the most nominal contact, such as a tap on the shoulder, is capable of doing so where, for instance, the person tapped just had shoulder surgery, or where the tap startles someone at the top of a staircase, causing him to fall and suffer injury. Yet *Curtis Johnson* held the degree of force used

in a shoulder tap is *not* "*violent* force." Thus, the government's all-encompassing reading of *Curtis Johnson* cannot be reconciled with the result reached in that very case. And it would eviscerate the fundamental distinction the Court sought to draw between violent and non-violent force, sweeping in every offense requiring physical contact.

To avoid that absurd result, the Court need only read the word "capable" in context. When read in conjunction with the entire opinion, "*violent* force" cannot mean any force potentially capable of causing pain or injury in an outlier case, as the government proposes. Instead, it must mean a degree of force reasonably expected to cause pain or injury. That understanding comports with the Court's repeated characterization of "*violent* force" as a substantial or heightened degree of force. It is therefore the only way to reconcile the Court's "*violent* force" definition with the extensive discussion surrounding and explaining it.

That contextual and sensible reading of *Curtis Johnson*'s "*violent* force" definition is bolstered by the Court's rejection of one of the government's arguments in that case. Specifically, the government pointed out that 18 U.S.C. § 922(g)(8)(C)(ii) prohibits the possession of a firearm by anyone subject to a protective order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child that would reasonably be expected to cause bodily injury." The government argued that, because the ACCA's elements

clause does not include the "reasonably . . . expected to cause bodily injury" language, the Court should decline to import such a qualifier into the ACCA. *Curtis Johnson*, 559 U.S. at 143.

The Court squarely rejected that argument, both as a matter of statutory interpretation and as a matter of logic. *Id.* The Court refused to infer the deliberate omission of a similar qualifier in § 924(e)(2)(B)(i), because § 922(g)(8) was enacted eight years after the ACCA. *Id.* And, the Court added, even if Congress did not intend to limit the ACCA to force reasonably expected to cause bodily injury, it still would not logically follow that " 'physical force' would consist of the merest touch. It might consist, for example, of only that degree of force necessary to inflict pain—a slap in the face, for example." *Id.* By refusing to infer the deliberate omission of a "reasonable expectation of injury" qualifier—and by acknowledging that a substantial degree of force reasonably expected to cause pain might qualify as "*violent* force"—the Court confirmed that "a substantial degree of force" is that reasonably expected to cause pain or injury.

Measuring the requisite degree of force in that way explains why a slap in the face might involve "*violent* force," but a shoulder tap does not. That measurement is also consistent with the lone citation the Court appended to its "*violent* force" definition. *Id.* at 140 ("the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person. See *Flores v. Ashcroft*, 350 F.3d 666, 672 (C.A.7 2003) (Easterbrook, J.)."). On the pin-cited

page of *Flores*, the Seventh Circuit explained that, to "avoid collapsing the distinction between violent and non-violent offenses," "the force [must] be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so." 350 F.3d at 672. Thus, "[a]n offensive touching is on the 'contact' side of this line, a punch on the 'force' side." *Id.* By endorsing that dividing line, the Court in *Curtis Johnson* sought to create a clear distinction between violent and non-violent offenses.

3. A "Minor" Use of Force Is Not "*Violent* Force"

The Court confirmed the correctness of Petitioner's reading of *Curtis Johnson* in *Castleman*. There, the Court interpreted the elements clause in 18 U.S.C. § 921(a)(33)(A)(ii), defining "misdemeanor crime of violence" for purposes of 18 U.S.C. § 922(g)(9) (prohibiting firearm possession by those with such misdemeanors) as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon by a current or former spouse, parent, guardian [and like individuals]." Because of contextual differences between that statute and the ACCA's elements clause, the Court held *Curtis Johnson*'s "*violent* force" definition did not apply in the "misdemeanor crime of domestic violence" context; instead, the Court gave "physical force" its broader common law meaning. *Castleman*, 134 S. Ct. at 1410-13.

In the process, however, the Court reaffirmed *Curtis Johnson*'s stricter "*violent* force" definition for the ACCA. *Id.* at 1410-11 & n.4. And, in doing so, the Court reiterated that "*violent* force" "'connotes a substantial degree of force.'" *Id.* at 1410-11 (quoting *Curtis Johnson*, 559 U.S. at 140). *Castleman* also expressly recognized that "[m]inor uses of force may not constitute 'violence' in the generic sense" employed in *Curtis Johnson*. *Id.* at 1412. "For example," the Court explained, "in an opinion that we cited with approval in [*Curtis*] *Johnson*, the Seventh Circuit noted that it was 'hard to describe as violence a squeeze of the arm that causes a bruise.'" *Id.* (quoting *Flores*, 350 F.3d at 670) (brackets, quotation marks, and alterations omitted). As explained below, Florida robbery can be committed with far less force than that.

B. Florida Robbery Lacks "*Violent* Force" as an Element Because the Offense Requires Only a Slight Degree of Force

"At common law . . . , robbery was an aggravated form of larceny. Specifically, the common law defined larceny as 'the felonious taking, and carrying away, of the personal goods of another.'" *Carter v. United States*, 530 U.S. 255, 278 (2000) (Ginsburg, J., dissenting) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 230 (1769)). "Unlike larceny, however, robbery included one further essential component: an element of force, violence, or intimidation." *Id.* at 279. Florida codified the crime of robbery in 1868, and the Florida Supreme Court has interpreted that core

component of the offense in accordance with the common law ever since. *See Pippin v. State*, 136 So. 883, 884 (Fla. 1931); *Montsdoca v. State*, 93 So. 157, 158-59 (Fla. 1922); *Simmons v. State*, 25 So. 881, 882 (Fla. 1899).

In 1987, however, Florida diverged from the common law in one significant respect: *when* the force, violence, or putting in fear must occur. Until that time, "Florida followed the common law rule for robbery, which required that the 'force, violence, assault, or putting in fear must occur prior to or contemporaneous with the taking of property.'" *Rockmore v. State*, 140 So. 3d 979, 982 (Fla. 2014) (quoting *Royal v. State*, 490 So. 2d 44, 45 (Fla. 1986) (quotation marks omitted)). Under the pre-1987 common law rule in Florida, "if violence was not used to take property, but was used to flee with stolen property, there could be no robbery." *Id.*; *see Royal*, 490 So. 2d at 45-46 (holding that fleeing shoplifters who used force to escape did not commit robbery). In response to the Florida Supreme Court's decision in *Royal*, however, the Florida "Legislature amended the robbery statute to prevent this result by expanding robbery to include force occurring in an attempt to take money or property, or in flight after the attempt or taking." *Rockmore*, 140 So. 3d at 982 (quotation and brackets omitted); *see* Fla. Stat. § 812.13(3)(b) (1987) (expanding definition of "in the course of the taking"); *Robinson v. State*, 692 So. 2d 883, 886 n.9 (Fla. 1997) (discussing 1987 amendment).

Despite the 1987 legislative expansion, Florida has continued to retain the core common law element

requiring "the use of force, violence, assault, or putting in fear," Fla. Stat. § 812.13(1), including at the time of Petitioner's 1997 conviction.[1] As the government conceded in the court of appeals, those statutory alternatives are different means by which this indivisible element of Florida's robbery offense may be satisfied. Gov't C.A. Reply Br. 1. Thus, under the categorical approach, if any one of those means of commission sweeps more broadly than the ACCA's elements clause, the offense is categorically overbroad. Florida robbery when committed by the "use of force" is categorically overbroad because, as explained below, it may be committed by only a slight degree of force.

1. Florida Robbery Can Be Committed by *Any* Degree of Force, Provided it Overcomes Resistance

In *Curtis Johnson*, the Court deferred to the Florida Supreme Court's holding that, consistent with the common law Florida battery could be committed "by *any* intentional physical contact." 559 U.S. at 138-39 (citing *State v. Hearns*, 961 So. 2d 211, 218 (Fla. 2007)). Similarly here, the Florida Supreme Court has repeatedly embraced the common law rule that

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[1] The current version of the Florida robbery statute, which was in effect at the time of Petitioner's conviction, defines "[r]obbery" as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1992).

robbery can be committed by *any* degree of force. *See* 4 *Wharton's Criminal Law* § 460 (15th ed. 2017) ("The degree of force used is not material."); Note, *A Rationale of the Law of Aggravated Theft*, 54 Colum. L. Rev. 84, 87 (1954) ("[T]he degree of violence is immaterial at common law.").

In *Montsdoca v. State*, 93 So. 157 (Fla. 1922), the Florida Supreme Court explained that, in accordance with the common law, the use of force distinguished robbery from larceny; there can be no robbery without force and no larceny with it. *Id.* at 158-59. But the court cautioned that "[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance." *Id.* at 159. As long as some resistance is overcome, "[t]he degree of force used is *immaterial*." *Id.* (emphasis added); *accord Martin v. State*, 129 So. 112, 114 (Fla. 1930).

In *McCloud v. State*, 335 So. 2d 257 (Fla. 1976), the Florida Supreme Court, after citing *Montsdoca*, reaffirmed that the degree of force used is immaterial, by stating: "*Any degree of force* suffices to convert larceny into a robbery." *Id.* at 258 (emphasis added). Only "[w]here no force is exerted upon the victim's person, as in the case of a pickpocket," does a larceny rather than a robbery occur. *Id.* at 259; *accord Bates v. State*, 465 So. 2d 490, 492 (Fla. 1985) ("As we stated in *McCloud*, any degree of force suffices to convert larceny into a robbery.") (citation and brackets omitted). Applying *McCloud*, Florida courts recognized that the degree of force necessary to overcome resistance could

be "ever so little." *Santiago v. State*, 497 So. 2d 975, 976 (Fla. Dist. Ct. App. 1986).

In *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), the Florida Supreme Court clarified whether purse snatching constituted theft or robbery. *Id.* at 884. The court held that the answer depended on whether the victim resisted: if so, and the offender overcame that resistance, it was robbery; if not, it was theft. *See id.* at 885-87. As to the elements of robbery, the court favorably cited *Montsdoca*, summarized *McCloud*, and then stated: "In accord with our decision in *McCloud*, we find that in order for the snatching of property from another to amount to robbery . . . there must be resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886.[2]

By reaffirming *Monstdoca* and *McCloud*, and by recognizing that even some purse snatchings could constitute robbery so long as there was victim resistance, the Florida Supreme Court reiterated the longstanding rule in Florida that "[t]he degree of force used is immaterial," *Montsdoca*, 93 So. at 158, such that "[a]ny degree of force" will suffice, *McCloud*, 335 So. 2d at 258. The only qualification is that the force must overcome resistance. But, as explained below,

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[2] In response to the other half of *Robinson*'s holding—*i.e.*, that snatching constituted theft where there was no resistance—the Florida Legislature created a new, lesser form of robbery known as "[r]obbery by sudden snatching." Fla. Stat. § 812.131 (1999). That distinct form of robbery is not at issue here.

overcoming resistance does not categorically require a substantial degree of force in every case.

2. Physical Resistance by the Victim May Be Slight

The reason any degree of force, no matter how slight, may suffice to overcome resistance is that a victim's resistance itself may be slight. The standard jury instructions in Florida make that proposition explicit: "The taking must be by the use of force," but "[t]he law does not require that the victim of robbery resist to any particular extent"; there just needs to be "some resistance to make the taking one done by force." Fla. Std. Jury Instr. (Crim.) 15.1 (2018).[3] Consistent with that instruction, Florida appellate courts have uniformly recognized that a robbery victim may "resist[ ] in any degree." *S.W. v. State*, 513 So. 2d 1088, 1091 (Fla. Dist. Ct. App. 1987) (quoting *Adams v. State*, 295 So. 2d 114, 116 (Fla. Dist. Ct. App. 1974) and *Mims v. State*, 342 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977)); *see Robinson*, 692 So. 2d at 886 (citing *S.W.*, *Adams*, and *Mims* with approval).

That aspect of Florida law gives rise to a key dynamic: where the victim's physical resistance is slight, so too will be the degree of force necessary to overcome

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[3] That instruction has long been in effect, including at the time of Petitioner's conviction. *See Standard Jury Instructions in Criminal Cases (97-1)*, 697 So. 2d 84, 94 (Fla. 1997); *Standard Jury Instructions in Criminal Cases (95-2)*, 665 So. 2d 212, 217 (Fla. 1995); *In re Standard Jury Instructions in Criminal Cases*, 543 So. 2d 1205 (Fla. 1989) (Exh. 6).

it. *See United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017) (recognizing that under Florida law, "if the resistance itself is minimal, then the force used to overcome that resistance" may be too); *United States v. Lee*, 886 F.3d 1161, 1169 (11th Cir. 2018) (Jordan, J., concurring) ("[G]iven minimal resistance, Florida robbery can be committed with minimal force"). As a matter of proportionality, where the victim's resistance is ever-so slight, fleeting, or reflexive, overcoming such resistance will not require a prolonged, intense struggle where the offender physically overpowers the victim. It will require only slight force.

The Ninth Circuit correctly observed that, in holding that Florida robbery satisfies the elements clause, "the Eleventh Circuit . . . overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Geozos*, 870 F.3d at 901. Indeed, the Eleventh Circuit inexplicably assumed that "*violent* force" is always or inherently necessary to overcome resistance. And it made that assumption without carefully examining Florida law to determine the least culpable conduct for conviction. *See United States v. Fritts*, 841 F.3d 937, 939-44 (11th Cir. 2016) (reaffirming precedential status of prior decisions that had failed to analyze Florida law; analyzing Florida law *only* to reject the distinct argument that, before *Robinson*, a "mere snatching" without resistance constituted robbery). Had the Eleventh Circuit scrutinized Florida law to determine the least culpable conduct, as this Court's precedents dictate, it would have found ample

confirmation for what the Florida Supreme Court has explicitly held: robbery can be committed with "[a]ny degree of force." *McCloud*, 335 So. 2d at 258.

3. Florida Robbery May Be Committed by Only the Slight Degree of Force Necessary to Overcome Slight Resistance

In accordance with the principles announced by the Florida Supreme Court, several cases vividly reflect the sweeping breadth of Florida's robbery statute. It can be violated by even the slightest use of force, and such force does not amount to "*violent* force" under *Curtis Johnson*.

a. The Florida Supreme Court itself addressed one such scenario in *Colby v. State*, 35 So. 189 (Fla. 1903). In that case, the victim "caught the arm or hand" of a pickpocket on a crowded street "and held it" as he called out to his friend and the police for assistance. *Id.* at 190. The defendant and the victim became "clinched," and the defendant sought "to escape from the grasp" of the victim to avoid arrest. *Id.* Because Florida at that time was still following the common law rule requiring the force to occur before or during the taking, the conduct in *Colby* was deemed a larceny, as "the force [was] used merely in an effort to escape." *Id.* However, the Florida Supreme Court later explained in *Robinson* that, following the 1987 amendment to Fla. Stat. § 812.13, "the crime in *Colby* . . . would be robbery under the current version of the statute because the perpetrator used force to escape the victim's grasp." 692 So. 2d at 887 n.10.

Thus, at the time of Petitioner's conviction, the degree of force used simply to pull one's arm or hand free from another's grasp could elevate a garden-variety pickpocketing to a robbery. But that degree of force is not "substantial." It is certainly not reasonably expected to cause pain or injury; rather, it is used only to get away after being unexpectedly caught in the act. And only the slightest degree of force will be needed to pull away when the victim's grasp is tenuous, or when the victim releases after only a moment. The escaping offender will overcome resistance by the slightest pull. That force is quintessentially non-violent.

b. Florida robbery can also be committed by grabbing money from someone's closed fist, without even touching the person. For example, in *State v. Dawkins*, the defendant "confronted the victim about . . . rent money at which time the victim attempted to hand[ ] him some money." Complaint/Arrest Affidavit, Case No. 17003199 (Fla. Cir. Ct. Feb. 17, 2017); App. 7a-8a. But "as [the defendant] grabbed a hold of the money," "the victim pulled back as she held on to the money, not letting go." *Id.* At that point, the defendant "grabbed a hold of the money as one bill ripped during the altercation." *Id.* Although the defendant used no additional force, he was charged with, and convicted of, robbery under Fla. Stat. § 812.13. Judgment, Case No. 17003199 (Fla. Cir. Ct. June 29, 2017); App. 9a-17a.

The degree of force used in *Dawkins* was not "a substantial degree of force." Indeed, the offender did not even touch the victim; he merely grabbed money held in the victim's outstretched hand. And the victim's

resistance consisted simply of withdrawing her initial offer, retracting her hand, and holding on to the money. As reasonably expected, no physical pain or injury resulted. In no sense can that slight degree of force be considered "severe," "extreme," "furious," "vehement," "strong," or "power[ful]." *Curtis Johnson*, 559 U.S. at 139-40, 142 (citations omitted).

c. Even when the defendant does touch the victim's hand during a cash grab, the degree of force necessary to overcome resistance may still be slight where the resistance itself is slight. In *Sanders v. State*, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000), the appellate court addressed "whether the state presented sufficient evidence of a robbery" by force where the defendant approached the victim, asked him for change to make a phone call, and, as the victim reached into his pocket, "reached over and grabbed" cash out of the victim's other hand. *Id.* at 506. Citing *Robinson*, the court held that this was indeed robbery, because the defendant "had to peel [the victim's] fingers back in order to get the money." *Id.* at 507. Although the victim was not injured, the "clutching of his bills in his fist" was "as an act of resistance against being robbed." *Id.* And, the court emphasized, "[t]he fact that [the victim] did not put up greater resistance [did] not transform [the] act into a simple theft or, under the new statute, a robbery by snatching." *Id.* *See also Winston Johnson v. State*, 612 So. 2d 689, 690-91 (Fla. Dist. Ct. App. 1993) (upholding conviction for robbery by force where the defendant approached the victim, "reached across her shoulder, 'raked' her hand and grabbed the money").

Neither the conduct in *Sanders* nor that in *Winston Johnson* involved "a substantial degree of force." The defendant in *Sanders* did no more than open the victim's hand and grab money, doing both "at the same time" and using "the same hand." 769 So. 2d at 507. And the victim did no more than momentarily "clutch" the bills, without "put[ting] up greater resistance." *Id.* Thus, only slight force was needed to loosen that weak grip. As would be reasonably expected, no pain or injury resulted. In *Winston Johnson*, similar (if not less forceful) conduct—merely "rak[ing]" the victim's hand—unexpectedly caused "slight injury" only because the victim happened to have a scab on her finger. 612 So. 2d at 690-91. The slight degree of force used in those cases was not "severe," "extreme," "furious," "vehement," "strong," or "power[ful]." *Curtis Johnson*, 559 U.S. at 139-40, 142 (citations omitted). It thus fell short of the "substantial degree of force" necessary to constitute "*violent* force."

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As the Ninth Circuit panel unanimously concluded, "Florida caselaw makes it clear that one can violate section 812.13 without using violent force." *Geozos*, 870 F.3d at 900. The above cases demonstrate that robbery may be committed without a substantial degree of force. Rather than involving an "unusual degree of strength or energy," or an "extreme," "furious," "severe," "vehement," or "strong" use of force or "power," *Curtis Johnson*, 559 U.S. at 139-40, 142 (citations omitted), they involved precisely the sort of "minor" uses of force *Castleman* characterized as non-violent. In fact,

each example above involved far less force than the bruising arm-squeeze that *Castleman* doubted would rise to the level of "*violent* force." 134 S. Ct. at 1411-12. Because Florida robbery can be committed without "*violent* force," it is categorically overbroad and thus not a "violent felony" under the elements clause.

4. The Government Acknowledges That Conduct Materially Indistinguishable From, and Even Less Forceful Than, Conduct Criminalized in Florida Does Not Involve "*Violent* Force"

In its brief in opposition, the government acknowledged that three court of appeals' opinions had correctly concluded that other state robbery offenses were not "violent felon[ies]," because "the degree of force required under state law was not sufficient to satisfy the ACCA's elements clause." BIO 14-15 (discussing *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017); and *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016)). That acknowledgment bolsters Petitioner's argument here because the least culpable conduct considered in those cases is materially indistinguishable from, and in some cases more forceful than, the conduct criminalized as robbery in Florida. And because the conduct discussed in all of the other circuit cases was at least potentially "capable" of causing pain or injury, the government's acknowledgement refutes its own reading of *Curtis Johnson*'s "*violent* force" definition.

a. In *Gardner*, the Fourth Circuit addressed North Carolina common law robbery, for which (like Florida robbery) the state's highest court had confirmed "the degree of force used is immaterial." 823 F.3d at 803 (quotation omitted). The Fourth Circuit concluded that this offense was not a "violent felony" because a state appellate court had upheld a robbery "conviction when a defendant pushed the shoulder of an electronics store clerk, causing her to fall onto shelves while the defendant took possession of a television." *Id.* at 803-04.

The government agrees with the Fourth Circuit that such conduct does not satisfy *Curtis Johnson*. *See* BIO at 14-15. But that admittedly non-violent conduct is materially indistinguishable from the conduct deemed sufficient for a Florida robbery conviction in *Rumph v. State*, 544 So. 2d 1150 (Fla. Dist. Ct. App. 1989). In *Rumph*, a shoplifter caught leaving a store "push[ed] [an employee] out of the way as he bolted through the front door. As [the employee] was shoved out of the way, she hit her shoulder on the door," but sustained no reported injury. *Id.* at 1151. In light of the 1987 legislative amendment to Fla. Stat. § 812.13, the appellate court concluded that the offender's slight use of force during flight—following a completely non-violent, stealth taking where he had no contact with another person—was sufficient to transform an otherwise petty theft into robbery. *Id.* at 1151-52.

No meaningful distinction can be drawn between the shove considered in *Gardner* and the shove in *Rumph*. If anything, the escape-facilitating shove in

Rumph, which resulted in no reported injury, was *less* forceful than the theft-facilitating shove *Gardner* deemed non-violent. Surely the latter conduct, which the government agrees is not violent, was more forceful than the conduct in *Colby*, where the offender merely sought to escape from the victim's grasp. And it is likewise more forceful than the conduct in *Dawkins*, where the offender simply grabbed cash without even touching the victim.

b. In *Winston*, the Fourth Circuit similarly concluded that Virginia common law robbery did not categorically require "*violent* force" based on a case upholding a conviction where the defendant "approached the victim from behind, tapped her on the shoulder, . . . jerked her around by pulling her shoulder, took her purse, and ran," even though the "victim's resistance in that case was limited to the fact that she was forced to turn and face the defendant." 850 F.3d at 685 (quotations omitted). And, in *Yates*, the Sixth Circuit found Ohio statutory robbery did not categorically require "*violent* force" based on a case upholding a conviction where the victim "had a firm grasp of her purse, with the strap over her shoulder, when the defendant pulled it from her and then pulled her right hand off of her left hand . . . where she was holding the bottom part of her purse." 866 F.3d at 729 (quotation and brackets omitted).

The government agrees the purse-tugging conduct considered in *Winston* and *Yates* is non-violent. *See* BIO at 14-15. But such conduct was comparable to that deemed sufficient for the robbery conviction in

Benitez-Saldana v. State, 67 So. 3d 320 (Fla. Dist. Ct. App. 2011). In *Benitez-Saldana*, the Florida appellate court held that "a conviction for robbery may be based on a defendant's act of engaging in a tug-of-war over the victim's purse." *Id.* at 323 (citing *McCloud* for the proposition that "any degree of force suffices") (brackets omitted). The offender considered in *Winston* went beyond the mere tug-of-war in *Benitez-Saldana* by "jerking" the victim around before grabbing her purse, 850 F.3d at 685, and the offender considered in *Yates* pulled the victim's hand off a purse that she "firm[ly] grasp[ed]," 866 F.3d at 729. Yet the government agrees that such conduct does not satisfy *Curtis Johnson*.

c. In *Yates*, the Sixth Circuit also relied on an Ohio robbery conviction committed by "bumping an elderly victim in order to distract her attention while another person removed her wallet from her purse." 866 F.3d at 729 (quotation omitted). In this scenario also, the government agrees that the force involved was not "*violent* force." *See* BIO at 14-15. But the bump that compelled the ruling in *Yates* was no less forceful than the conduct deemed sufficient for a robbery conviction in *Hayes v. State*, 780 So. 2d 918 (Fla. Dist. Ct. App. 2001), where the defendant merely "'bumped' [the victim] from behind with his shoulder." *Id.* at 919. While the victim surmised that the bump "probably would have caused her to fall to the ground but for the fact that she was in between rows of cars," she did not fall, let alone suffer pain or injury. *Id.* There is no basis to find the harmless bump in *Hayes* more forceful than the harmless bump considered in *Yates*.

* * *

In short, the conduct sufficient for a robbery conviction in Florida is materially indistinguishable from, and in fact less forceful than, the conduct addressed in *Gardner*, *Winston*, and *Yates*. Because the government has acknowledged that the degree of force considered in those cases was correctly deemed non-violent, the same must be true of the conduct criminalized as robbery in Florida. And because the non-violent conduct highlighted in *Gardner*, *Winston*, and *Yates* was all potentially "capable" of causing pain or injury (even if it did not actually cause pain or injury), the government's reading of *Curtis Johnson* cannot be correct. Instead, the Court should apply the straightforward test *Curtis Johnson* announced: if the conduct requires a "substantial degree of force," then it is "*violent* force"; if not, then not. The least culpable conduct necessary to commit robbery in Florida falls squarely on the non-violent side of that line.

C. Treating Florida Robbery as an ACCA "Violent Felony" Would Conflict with Congress' Purpose of Targeting Only Those Offenders Likely to Commit Gun Violence

Characterizing slight force as "*violent* force" would contravene not only *Curtis Johnson* (and *Castleman*), but the ACCA's "basic purpose[]." *Begay v. United States*, 553 U.S. 137, 146 (2008). "As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Id.* "In order to determine which offenders fall into this category, the Act looks to past

crimes . . . because an offender's criminal history is relevant to the . . . kind or degree of danger the offender would pose were he to possess a gun." *Id.* "[A] prior crime's relevance to the possibility of future danger with a gun" will not exist where it exhibits a mere "callousness toward risk," but rather—and only—where it reflects "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* As this Court recognized in *Begay*: "We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist." *Id.*

That increased likelihood is absent here, because Florida robbery may be committed by conduct that is neither designed nor expected to cause any physical harm. As explained above, Florida robbery encompasses the unsuccessful pickpocket who uses force only to escape from his victim's grasp, and the unsuccessful shoplifter who uses force only to flee the scene. When a thief uses force only to escape after a non-violent crime, there is no basis to predict a deliberate willingness to physically harm someone in the future, let alone shoot someone. If anything, the pickpocket and the shoplifter are acutely averse—not predisposed—to violence. Indeed, the shoplifter need not even go near another person. And both types of petty criminals go out of their way to *avoid* a physical confrontation; the very success of their endeavors depends on it. Instead, their use of force is largely reflexive and reactive, coming only after they are unexpectedly caught in non-violent criminal acts. Such conduct

cannot plausibly predict an increased likelihood of future gun violence.

The same is true for grabbing cash out of someone's hand. The offender uses slight force for the sole purpose of obtaining the property, not causing any physical harm. To be sure, that conduct reflects some "callousness toward risk." But that is not enough to subject someone to the ACCA's severe penalties, because that conduct is so "far removed" from the "kind of behavior associated with violent criminal use of firearms" that it lacks any predictive value as to gun violence. *Begay*, 553 U.S. at 146-47. In that regard, Petitioner's understanding of *Curtis Johnson*'s "*violent* force" definition dovetails perfectly with the basic purposes of the ACCA: a past use of slight force that is not reasonably expected to cause pain or injury will not make a § 922(g) offender any more likely to deliberately pull a trigger in the future.

Put simply, sustaining the ACCA's mandatory 15-year penalty based on Florida robbery would sweep in a "host" of garden-variety, petty criminal conduct that is "not typically committed by those whom one normally labels 'armed career criminals.'" *Id.* at 146. Doing so would clash with the statute's basic purpose, rigidly mandating severe prison sentences based on glorified pickpocketing, shoplifting, and cash-grabbing. Petitioner's position here would avoid that incongruous and draconian result. And, at the same time, it would still flexibly permit sentencing judges to consider the facts of a defendant's prior robbery offense when exercising their considerable discretion to impose

an individualized sentence up to the ten-year maximum for a § 922(g) offense. *See* 18 U.S.C. § 3553(a).

* * *

In sum, Florida robbery can be committed by only a slight degree of force, and such force is not "*violent* force." Because "*violent* force" is not required to commit Florida robbery, that offense does not have "as an element" the use, attempted use, or threatened use of "physical force." 18 U.S.C. § 924(e)(2)(B)(i). Accordingly, Florida robbery is not a "violent felony" under the ACCA.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed and the case remanded.

Respectfully submitted,

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JUNE 11, 2018

No. 17-5554

In the Supreme Court of the United States

DENARD STOKELING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior conviction for robbery, in violation of Fla. Stat. § 812.13 (1995), was a conviction for a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), because that offense "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i).

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TABLE OF AUTHORITIES

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Cases—Continued: Page

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Johnson v. *United States*, 559 U.S. 133 (2010) ..... *passim*
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18 U.S.C. 924(e)(2)(B) 4, 10a
18 U.S.C. 924(e)(2)(B)(i) ..... *passim*, 10a

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18 U.S.C. App. 1202(c)(8) (Supp. II 1984) 3, 7, 15, 17
Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39 ..... 3, 16
Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449:
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§ 812.13(1) 5, 9, 31, 14a
§ 812.13(3)(b) 31, 15a
§ 812.131(1) (1999) 13

Miscellaneous:

2 Joel Prentiss Bishop, *Bishop on Criminal Law* (9th ed. 1923) 17, 18
Black's Law Dictionary (9th ed. 2009) 11
William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* (2d ed. 1905) 17, 18
132 Cong. Rec. 7697 (1986) 3, 16
Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 17
H.R. Rep. No. 1073, 98th Cong., 2d Sess. (1984) 2, 15
H.R. Rep. No. 849, 99th Cong., 2d Sess. (1986) 3, 18

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Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary on H.R. 4639 & H.R. 4768: Armed Career Criminal Legislation, 99th Cong., 2d Sess. (1986) 16

2 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* (2d ed. 1828) 17

S. Rep. No. 307, 97th Cong., 1st Sess. (1981) 15, 17

S. Rep. No. 190, 98th Cong., 1st Sess. (1983) 2, 15

Webster's New International Dictionary (2d ed. 1954) 11

2 Francis Wharton, *A Treatise on Criminal Law* (11th ed. 1912) 17, 18

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OPINION BELOW

The opinion of the court of appeals (J.A. 28-40) is not published in the Federal Reporter but is reprinted at 684 Fed. Appx. 870.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2017. On June 12, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 4, 2017, and the petition was filed on that date. The petition for a writ of certiorari was granted on April 2, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-28a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). J.A. 20. He was sentenced to 73 months of imprisonment, to be followed by two years of supervised release. J.A. 21-22. The court of appeals vacated the sentence and remanded for resentencing. J.A. 28-40.

1. Concerned that "a 'large percentage' of crimes of theft and violence" were "'committed by a very small percentage of repeat offenders,'" Congress enacted the Armed Career Criminal Act of 1984 (ACCA) to "supplement the States' law enforcement efforts against 'career' criminals." *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (quoting H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1 (1984) (1984 House Report)); see Pub. L. No. 98-473, Tit. II, ch. 18, 98 Stat. 2185 (18 U.S.C. App. 1202(a) (1982 & Supp. II 1984)) (repealed in 1986 by the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104(b), 100 Stat. 459). As originally enacted, the ACCA prescribed a 15-year minimum sentence for any person who received, possessed, or transported a firearm in commerce following three prior convictions "for robbery or burglary." 18 U.S.C. App. 1202(a) (1982 & Supp. II 1984).

Congress focused on robbery and burglary because it viewed those offenses as "the most common violent street crimes." S. Rep. No. 190, 98th Cong., 1st Sess. 5 (1983) (1983 Senate Report). The original version of the ACCA defined robbery as "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person

will imminently be subjected to bodily injury." 18 U.S.C. App. 1202(c)(8) (Supp. II 1984). In 1986, Congress amended the definition of robbery by replacing "bodily injury" with "bodily harm" and "any felony" with "any crime punishable by a term of imprisonment exceeding one year." FOPA § 104(a)(4), 100 Stat. 458.

Later in 1986, Congress amended the ACCA again, "expand[ing] the predicate offenses triggering the sentence enhancement from 'robbery or burglary' to 'a violent felony or a serious drug offense.'" *Taylor*, 495 U.S. at 582; see Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39. Senator Specter, who sponsored a bill that was one of the sources of the amendment, explained that because the ACCA "ha[d] been successful with the basic classification of robberies and burglaries as the definition for 'career criminal,'" the "time ha[d] come to broaden that definition so that we may have a greater sweep and more effective use of this important statute." *Taylor*, 495 U.S. at 583 (quoting 132 Cong. Rec. 7697 (1986)). The updated language did not list robbery explicitly as a predicate offense, but included an "elements clause," *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016), which covered any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). The House Report accompanying the ACCA explained that the language of the elements clause would encompass both "robbery" and other crimes, like "murder, rape, [and] assault," that "involv[e] physical force against a person." H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) (1986 House Report); see *id.* at 4.

Specifically, the amended version of the statute, which remains in effect today, applies its enhanced penalty to a defendant who is convicted of unlawful possession, transportation, or receipt of a firearm under 18 U.S.C. 922(g), and who has three prior convictions for a "violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). It defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B).

2. In 2015, two people burglarized the Tongue & Cheek restaurant in Miami Beach, Florida. D. Ct. Doc. 30, at 1 (Mar. 2, 2016). Petitioner worked at the restaurant, and the police identified him as a suspect. *Ibid.* Police officers subsequently approached petitioner as he was reporting to work and asked whether he had any weapons on him. *Id.* at 1-2. Petitioner stated that he had a gun in his backpack and handed the backpack to the officers. *Id.* at 2. The officers found a semi-automatic firearm, a magazine, and 12 rounds of ammunition. *Ibid.* A federal grand jury in the Southern District of Florida indicted petitioner on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1), and petitioner pleaded guilty to that offense, J.A. 20.

The Probation Office recommended that petitioner be sentenced as an armed career criminal under the ACCA because he had three prior convictions "for a violent felony or serious drug offense," 18 U.S.C. 924(e)(1). Presentence Investigation Report (PSR) ¶ 17. Those convictions included a 1997 conviction for robbery, in violation of Fla. Stat. § 812.13 (1995). PSR ¶ 25; see J.A. 10. Under Florida law, robbery is defined as "the taking of money or other property * * * from the person or custody of another, * * * when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1995).

At sentencing, the district court focused on the "factual background" of petitioner's robbery conviction. Sent. Tr. 10; see PSR ¶ 25. As recounted by the Probation Office, and repeated by the court, petitioner and an accomplice had approached the victim while she was walking outside. PSR ¶ 25. Petitioner had "grabbed her by the neck and tried removing her necklaces" as she "held onto" them. *Ibid.* Petitioner's accomplice had then "grabbed [the necklaces] from her neck" and given them to petitioner. *Ibid.*; see Sent. Tr. 10. The court viewed the factual background provided by the Probation Office as insufficient "to justify an enhancement" under the ACCA, Sent. Tr. 11, and sentenced petitioner to 73 months of imprisonment, *id.* at 23.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. J.A. 28-40.

a. The court of appeals noted the parties' agreement that the district court had "erroneously looked to the underlying facts" of petitioner's robbery offense to make its own circumstance-specific judgment about whether his prior conviction was a violent felony under the ACCA. J.A. 30. The court of appeals explained that the

district court should have instead "applied the 'categorical approach,' which 'looks only to the elements of the crime.'" *Ibid.* (brackets and citation omitted); see *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016) (discussing categorical approach).

Applying that approach, the court of appeals determined that "a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA]." J.A. 29 (citing *United States* v. *Fritts*, 841 F.3d 937, 938, 943-944 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017), and *United States* v. *Dowd*, 451 F.3d 1244, 1255 (11th Cir.), cert. denied, 549 U.S. 941 (2006)). The court observed that "[a]n element of Florida robbery is 'the use of force, violence, assault, or putting in fear,' Fla. Stat. § 812.13, which requires 'resistance by the victim that is overcome by the physical force of the offender.'" J.A. 31 (quoting *Robinson* v. *State*, 692 So. 2d 883, 886 (Fla. 1997)). That "force element," the court explained, "satisfies the elements clause of the [ACCA]." *Ibid.*

b. Judge Martin concurred. J.A. 31-40. She agreed that petitioner's conviction, which postdated a 1997 decision by the Supreme Court of Florida that clarified the elements of robbery, necessarily involved enough "force" to qualify as an ACCA predicate. J.A. 32, 40. But she interpreted Florida decisional law between 1976 and 1997 to have allowed a robbery conviction for "conduct involving minimal force," like the "sudden snatching" of a purse, which she did not view as sufficient "force" under the ACCA's elements clause. J.A. 38-40.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that petitioner's prior conviction for robbery, in violation of Fla. Stat. § 812.13 (1995), was a conviction for a violent

felony under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i).

A. The ACCA's elements clause encompasses "any crime" punishable by imprisonment for more than one year that "has as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). In *Johnson* v. *United States*, 559 U.S. 133 (2010), this Court construed the phrase "'physical force'" in that clause to mean "force capable of causing pain or injury." *Id.* at 140.

The force required by Florida's robbery statute satisfies that definition. "[I]n order for the snatching of property from another to amount to robbery" under that statute, "there must be resistance by the victim that is overcome by the physical force of the offender." *Robinson* v. *State*, 692 So. 2d 883, 886 (Fla. 1997). A simple purse-snatching or pocket-picking does not count; instead, a physical contest between the offender and the victim is inherent in the crime. And the force required to prevail in such a contest—*i.e.*, "force sufficient to overcome a victim's resistance," *id.* at 887—is necessarily "force capable of causing physical pain or injury," *Johnson*, 559 U.S. at 140.

The history of the ACCA confirms that robbery offenses like Florida's satisfy the elements clause. As originally enacted in 1984, the ACCA listed only two predicate offenses, and robbery was one of them. The definition of robbery in the original version of the ACCA was drawn from the common law and therefore encompassed robbery offenses like Florida's, which is drawn from the same source. When Congress expanded the ACCA's predicate offenses in 1986, it did so by taking the defining aspect of its preexisting definition of "robbery"—namely, "force or violence," 18 U.S.C. App.

1202(c)(8) (Supp. II 1984)—and making it the basis for the new and more general elements clause. The term "force" in the elements clause is thus most naturally understood to incorporate the meaning it had in the common-law definition of robbery, with common-law robbery as the paradigmatic elements-clause offense. Construing that clause to require even more violence than was necessary for common-law robbery would not only untether it from any relevant preexisting legal framework, but would also exclude from its scope the basic (*i.e.*, non-aggravated) robbery-by-force crime of nearly every State at the time of the clause's enactment.

B. Although petitioner acknowledges (*e.g.*, Br. 4, 11) that *Johnson* construed "physical force" in the elements clause to mean "force capable of causing pain or injury," he effectively asks this Court to rewrite that definition to eliminate Florida robbery as an ACCA predicate. But his request is premised on a misunderstanding of the definition set forth in *Johnson*. Contrary to his contention (Br. 12), that definition is not "limitless," but instead requires that a predicate offense contain some narrowing feature that ensures that the offense categorically involves "force capable of causing physical pain or injury." A battery statute that may be violated by a tap on the shoulder, without more, does not contain such a feature; a robbery statute that requires that the force be "sufficient to overcome a victim's resistance," *Robinson*, 692 So. 2d at 887, does. In any event, the Court in *Johnson* was aware of each of petitioner's proposed alternative formulations of "physical force" and did not adopt them.

C. The Court should also reject petitioner's expansive interpretation of Florida's robbery statute. This Court typically defers to regional courts of appeals on

matters that involve the construction of state law. Regardless, petitioner provides no sound basis for construing Florida's robbery offense more broadly than the court of appeals did. In each of the Florida robbery cases that petitioner identifies, the defendant used force capable of causing physical pain or injury.

ARGUMENT

PETITIONER'S FLORIDA ROBBERY CONVICTION WAS A CONVICTION FOR A VIOLENT FELONY UNDER THE ACCA'S ELEMENTS CLAUSE

Florida defines "robbery" as theft "by means of" either (1) "intimidation by assault or putting in fear" or (2) "force or violence." *Robinson* v. *State*, 692 So. 2d 883, 886 (Fla. 1997); see Fla. Stat. § 812.13(1) (1995). That offense is a "violent felony" under the ACCA because it "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). Petitioner does not dispute that the "intimidation" form of Florida robbery, which requires placing the victim in fear of bodily harm or injury, see, *e.g.*, *Brown* v. *State*, 397 So. 2d 1153, 1155 (Fla. Dist. Ct. App. 1981), categorically satisfies the ACCA's elements clause. And contrary to petitioner's contention, the "force or violence" form of Florida robbery, which requires "force sufficient to overcome a victim's resistance," *Robinson*, 692 So. 2d at 887, does as well. This Court has held that a defendant uses "'physical force'" within the meaning of the ACCA when he employs "force capable of causing physical pain or injury to another person." *Johnson* v. *United States*, 559 U.S. 133, 140 (2010). A defendant who has overpowered a defiant victim in order to take property has necessarily used such force. Petitioner's contrary interpretation of the ACCA cannot be squared with this Court's

precedents and would implausibly suggest that the elements clause, which expanded the original ACCA's reference to "robbery," in fact excluded nearly every State's basic (*i.e.*, non-aggravated) robbery-by-force offense.

A. Force Sufficient To Overcome A Victim's Resistance For Purposes Of Florida Robbery Is "Physical Force" Under The ACCA's Elements Clause

The ACCA's elements clause encompasses "any crime" punishable by imprisonment for more than one year that "has as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). In *Johnson* v. *United States*, *supra*, this Court "made clear that 'physical force'" in that context "means 'force capable of causing physical pain or injury.'" *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1220 (2018) (quoting *Johnson*, 559 U.S. at 140); see *Bond* v. *United States*, 134 S. Ct. 2077, 2091 (2014) (similar). Force sufficient to overcome a Florida robbery victim's resistance meets that definition.

1. The Court in *Johnson* construed the phrase "'physical force'" in the ACCA by reference to its "ordinary meaning" and statutory context. *Johnson*, 559 U.S. at 138.

The Court explained that the "adjective 'physical'" "plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual or emotional force." *Johnson*, 559 U.S. at 138. Given that the term "physical force" appeared in the context of defining the phrase "violent felony," the Court rejected a "specialized legal usage of the word 'force'" drawn from misdemeanor common-law battery, which would have included "even the slightest offensive touching." *Id.* at 139. It noted that the word "force," in "general usage," means "'power, violence, compulsion,

or constraint exerted upon a person.'" *Id.* at 138-139 (quoting *Webster's New International Dictionary* 985 (2d ed. 1954)) (brackets omitted).

The Court held that, in the ACCA's elements clause, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. The Court further suggested that physical force, as it had defined the term, "might consist * * * of only that degree of force necessary to inflict pain—a slap in the face, for example." *Id.* at 143. In arriving at its definition, the Court in *Johnson* explicitly referenced force associated with robbery. See *id.* at 139. In particular, the Court observed that *Black's Law Dictionary* "defines 'physical force' as 'force consisting in a physical act, esp. a violent act directed against a robbery victim.'" *Ibid.* (quoting *Black's Law Dictionary* 717 (9th ed. 2009)) (brackets omitted).

2. The force required under Florida's robbery statute satisfies *Johnson*'s definition of "physical force" under the ACCA.

The Supreme Court of Florida has explained that "in order for the snatching of property from another to amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person. Rather, there must be resistance by the victim that is overcome by the physical force of the offender." *Robinson*, 692 So. 2d at 886; see *Montsdoca* v. *State*, 93 So. 157, 159 (Fla. 1922) (explaining that robbery requires "such force as is actually sufficient to overcome the victim's resistance"); *Johnson*, 559 U.S. at 138 ("We are * * * bound * * * by the Florida Supreme Court's interpretation of state law."). Only where the crime includes "force sufficient to overcome a victim's

resistance," *Robinson*, 692 So. 2d at 887, can it "legitimately be said that a crime of violence against the person of another—which is inherent in every robbery—has occurred," *S.W.* v. *State*, 513 So. 2d 1088, 1091 (Fla. Dist. Ct. App. 1987).

Any such crime necessarily involves "force capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140. Whatever form the victim's resistance may take—*e.g.*, grabbing hold of a purse as the defendant tries to take it away, *McCloud* v. *State*, 335 So. 2d 257, 259 (Fla. 1976); attempting to keep a necklace around her neck as the defendant tries to tear it off, *Santiago* v. *State*, 497 So. 2d 975, 976 (Fla. Dist. Ct. App. 1986); or standing in front of a doorway as the defendant tries to escape with stolen goods, *Rumph* v. *State*, 544 So. 2d 1150, 1151 (Fla. Dist. Ct. App. 1989)—Florida's robbery statute requires that the defendant meet that resistance with force of his own. *Robinson*, 692 So. 2d at 886. A physical contest between the defendant and the victim is thus inherent in the offense. And the force required to prevail in such a contest—*e.g.*, by ripping the purse from the victim's grasp, *McCloud*, 335 So. 2d at 259; tearing the necklace from around the victim's neck, *Santiago*, 497 So. 2d at 976; or knocking the victim out of the way of the exit, *Rumph*, 544 So. 2d at 1151—is invariably "capable of causing physical pain or injury," *Johnson*, 559 U.S. at 140.

Indeed, the force required under Florida's robbery statute often *does* cause physical pain or injury to the victim. See, *e.g.*, *McCloud*, 335 So. 2d at 258 (victim "died as a result of a fall" during a struggle with the defendant over her purse); *Benitez-Saldana* v. *State*, 67 So. 3d 320, 322 (Fla. Dist. Ct. App. 2011) ("'tug-of-war'" over the victim's purse caused "an abrasion on the

victim's arm"); *Rigell* v. *State*, 782 So. 2d 440, 441-442 (Fla. Dist. Ct. App. 2001) (defendant "yanked" a purse from "the victim's shoulder, causing her to feel sharp pain" and breaking the purse strap); *Jones* v. *State*, 652 So. 2d 346, 350 (Fla. 1995) (per curiam) (defendant "stabbed [the victim] in the back, leaving her to die in the bathroom"); *Santiago*, 497 So. 2d at 976 (defendant "reached into the victim's car and tore two gold necklaces from around her neck * * * , leaving the victim with a few scratch marks and some redness around her neck"); *Bates* v. *State*, 465 So. 2d 490, 490-491 (Fla. Dist. Ct. App. 1985) (per curiam) (defendant "tore a diamond ring from one of [the victim's] fingers," causing "injur[y]"); *Mims* v. *State*, 342 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977) (per curiam) (defendant "beat[]" the victim and "pushed [her] out of the car"). All that *Johnson* requires, however, is that the force be "capable" of causing such injury, which is true for every Florida robbery conviction.

A perpetrator who does not employ such force, and instead employs only "the force necessary to remove the property from the person," may be guilty of theft or larceny (or the post-1999 lesser crime of "[r]obbery by sudden snatching," Fla. Stat. § 812.131(1) (1999)), but is not guilty of robbery under Section 812.13. *Robinson*, 692 So. 2d at 886; see *Colby* v. *State*, 35 So. 189, 190 (Fla. 1903) ("Where one stealthily filches loose property from the pocket of another, and no more force is used than such as may be necessary to remove the property from the pocket, it is not robbery under the statute, but larceny."). Examples of "slight force" that would not support a robbery conviction include simple purse-snatching, pocket-picking, "snatching money from a person's hand," "grabbing a camera from a victim's shoulder,"

and the "stealthy taking of jewelry from a child during a game." *Robinson*, 692 So. 2d at 887 (citing cases); see *S.W.*, 513 So. 2d at 1090-1091 (explaining that "the only degree of force usually involved" in "a stealthy taking or sudden snatching of property" is "the slight amount of force necessary to physically remove the property from the person of another").

Florida's distinction between robbery and lesser theft offenses, based on the amount of force used in the commission of the crime, demonstrates that Florida robbery cannot be committed with "the slightest offensive touching," *Johnson*, 559 U.S. at 139, but instead requires an amount of force at least akin to "a slap in the face," *id.* at 143. See, *e.g.*, *Walker* v. *State*, 546 So. 2d 1165, 1166-1167 (Fla. Dist. Ct. App. 1989) (concluding that the defendant did not use "'force,' within the meaning of the robbery statute," even though the victim "felt his fingers on the back of her neck" as he took "her gold chain"). Just as "the 'force [or] violence' aspect of * * * robbery" has led state courts to describe it as "a crime of violence" rather than "just a theft," *S.W.*, 513 So. 2d at 1091, it likewise qualifies Florida robbery as a "violent felony" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i); see *Montsdoca*, 93 So. at 159 (explaining that "violence" is what distinguishes robbery from larceny).

3. The genesis and evolution of the ACCA confirm that robbery offenses like Florida's involve the "use * * * of physical force" under the ACCA's elements clause. 18 U.S.C. 924(e)(2)(B)(i). Indeed, they suggest that common-law robbery was the model elements-clause offense.

As previously noted, the original version of the ACCA prescribed a 15-year minimum sentence for any person convicted of certain firearms offenses following

three prior convictions for "robbery or burglary," 18 U.S.C. App. 1202(a) (1982 & Supp. II 1984), which were understood to be "the most common violent street crimes." 1983 Senate Report 5; see *id.* at 3 (referring to "[r]obbery" as a "violent crime"); 1984 House Report 3 (incorporating observation of Senator Specter that "[r]obberies involve physical violence or the threat thereof," with "30 percent" of them "result[ing] in physical injuries"). It defined "robbery" to include "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury." 18 U.S.C. App. 1202(c)(8) (Supp. II 1984).

That definition encompassed Florida robbery. The ACCA's language "adopt[ed] the terminology of common law robbery," under which it is "a crime to take property from another by force and violence, or by threatening or placing another person in fear." S. Rep. No. 307, 97th Cong., 1st Sess. 668 (1981) (1981 Senate Report); see *id.* at 671 ("This definition of the offense closely tracks the common law concept of robbery."); see also 1983 Senate Report 20 (cross-referencing discussion in 1981 Senate Report). In so doing, it incorporated "[t]he traditional requirement of a violent (as opposed to merely forceful) taking"—a requirement "designed to exclude those situations such as pickpocketing or removing property from a drunk or unconscious person, which do not pose special dangers of violence and, thus, are more appropriately dealt with as theft." 1981 Senate Report 671. That is precisely the line between sufficient and insufficient force drawn by Florida's robbery statute, which is likewise derived from the common

law. See *McCloud*, 335 So. 2d at 259; *Montsdoca*, 93 So. at 158-159; *Simmons* v. *State*, 25 So. 881, 882 (Fla. 1899).

Congress's subsequent enactment of the elements clause retained that same dividing line, while extending its applicability to both robbery and non-robbery felony offenses. See *Taylor* v. *United States*, 495 U.S. 575, 582 (1990) (explaining that the amendments "expanded the predicate offenses triggering the sentence enhancement"). In sponsoring one of the bills that led to that amendment, Senator Specter explained that "the[] original predicate offenses [of robbery and burglary] should continue to be included in the career criminal statute," but that it was "time" to give the statute "greater sweep" by amending it to "apply to career criminals whose prior offenses may be murder" or "rape." *Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary on H.R. 4639 and H.R. 4768: Armed Career Criminal Legislation*, 99th Cong., 2d Sess. 44, 46-47 (1986) (House Hearing); see 132 Cong. Rec. 7698 (1986) (same). Other Members of Congress expressed similar views. See House Hearing 8 (Rep. Wyden stating that it would be "a logical extension" of the ACCA to amend it to reach not just "a three-time bank robber," but also a "habitual offender with prior convictions for rape or murder"); *id.* at 2 (Rep. Hughes urging amendment of the ACCA to reach "murder, rape, assault, robbery, et cetera"—that is, "felonies involving physical force against a person").

Congress accordingly enacted an amendment, entitled "expansion of predicate offenses for armed career criminal penalties," that incorporated the prior terminology of the ACCA's "robbery" definition into a new and more general elements clause. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I,

Subtit. I, § 1402, 100 Stat. 3207-39 (capitalization and emphasis omitted). The original version of the statute had defined "robbery" by reference to (*inter alia*) "force or violence," 18 U.S.C. App. 1202(c)(8) (Supp. II 1984); the new elements clause made "force" the centerpiece of its expanded definition of a "violent felony," 18 U.S.C. 924(e)(2)(B)(i). That symmetry suggests that Congress incorporated the common-law robbery definition of "force" into the design of the elements clause. See *Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *Samantar* v. *Yousuf*, 560 U.S. 305, 320 n.13 (2010) ("Congress 'is understood to legislate against a background of common-law ... principles.'") (citation omitted); 1981 Senate Report 668, 671 (explaining that the definition of robbery in the original version of the ACCA was drawn from the common law).

Common-law robbery provided a ready-made framework for distinguishing violent from non-violent felonies. The common law regarded the force necessary to commit robbery as "violence." 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 1156, at 860-861 (9th ed. 1923) (Bishop); see 2 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* 68 (2d ed. 1828); 2 Francis Wharton, *A Treatise on Criminal Law* § 1093, at 1304 (11th ed. 1912) (Wharton). Unlike common-law battery (at issue in *Johnson*), common-law robbery could not be committed through negligible forms of "force" like unwanted touching, but instead required force "[s]ufficient * * * to overcome resistance." William L. Clark & William L. Marshall, *A Treatise on the*

Law of Crimes 553 (2d ed. 1905) (Clark & Marshall); see Wharton § 1089, at 1297-1298; Bishop § 1156, at 860-861; see also *Johnson*, 559 U.S. at 139 (distinguishing definition of force that included "a violent act directed against a robbery victim" from slight force sufficient for common-law battery) (citation omitted). Generalizing that approach through the elements clause would thus achieve Congress's goal of expanding the universe of ACCA predicates to include "all State and Federal felonies * * * involving physical force against a person," including "murder, rape, [and] assault"—as well as "robbery." 1986 House Report 4; see *id.* at 3 (explaining that the elements clause "would include such felonies involving physical force against a person * * * as murder, rape, assault, *robbery*, etc.") (emphasis added).[1]

4. Construing "physical force" under the ACCA to require even more violence than was necessary for common-law robbery crimes like Florida's would not only unmoor the elements clause from any relevant preexisting legal framework, but would also exclude from its scope the basic robbery-by-force crime of nearly every State at the time of the clause's enactment.

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[1] In *Johnson*, the government argued that the ACCA's elements clause was modeled on 18 U.S.C. 16(a) and thus encompassed simple battery, an offense mentioned in the legislative history of Section 16(a). U.S. Br. at 32-35, *Johnson*, *supra* (No. 08-6925). The Court in *Johnson*, however, rejected the government's argument that "the term 'force' in [the ACCA's elements clause] has the specialized meaning that it bore in the common-law definition of battery," 559 U.S. at 139, which the Court emphasized was "a misdemeanor, not a felony," at common law, *id.* at 141. As discussed in the text, the most evident source of a felony-focused definition of "physical force" was common-law robbery, which (unlike battery) was a felony. See Clark & Marshall 548 ("Robbery * * * is one of the common-law felonies.").

In 1986, when the elements clause was adopted, only five States had basic robbery-by-force offenses that would categorically require more force than Florida's. See App., *infra*, 28a. Nothing supports an interpretation of the elements clause, which was part of an amendment that *expanded* the scope of the ACCA beyond just "robbery or burglary," *Taylor*, 495 U.S. at 582, to in fact have drastically *narrowed* its application to robbery offenses. Cf. *Voisine* v. *United States*, 136 S. Ct. 2272, 2280-2281 (2016) (declining to construe 18 U.S.C. 921(a)(33)(A) in such a way as would "jeopardize" 18 U.S.C. 922(g)'s "force" in 34 States plus the District of Columbia); *United States* v. *Castleman*, 134 S. Ct. 1405, 1413 (2014) (declining to construe Section 921(a)(33)(A) in such a way as would render Section 922(g) "ineffectual in at least 10 States").

A uniquely restrictive ad hoc definition of "physical force" would have excluded not only most States' basic robbery-by-force offenses, but other paradigmatically violent crimes as well. For example, a standard of "force overcoming a victim's resistance" was also sometimes used to define forms of rape or sexual abuse. See, *e.g.*, *Moore* v. *State*, 502 So. 2d 819, 821 n.1 (Ala. 1986); *State* v. *LaMere*, 655 P.2d 46, 48 n.1 (Idaho 1982); *State* v. *Irving*, 601 P.2d 954, 955 n.1 (Wash. Ct. App. 1979). In the State of Washington, for instance, an element of first- and second-degree rape was "forcible compulsion," which was defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury" or of "be[ing] kidnapped." *Irving*, 601 P.2d at 955 n.1 (citation omitted). Congress would necessarily have understood the force inherent in such a rape offense as "physical force" for purposes of the ACCA's elements clause.

And the historical backdrop makes Congress's similar understanding as to such force in the context of robbery even clearer.

B. Petitioner's Narrowing Constructions Of "Physical Force" Cannot Be Squared With *Johnson*

In advocating a limiting construction of the ACCA's elements clause that would eliminate Florida robbery and similar offenses as ACCA predicates, petitioner effectively asks this Court to rewrite its decision in *Johnson*. Petitioner acknowledges (*e.g.*, Br. 4, 11) that *Johnson* defined "physical force" in the ACCA's elements clause to mean "force capable of causing physical pain or injury to another person." 559 U.S. at 140; see *Dimaya*, 138 S. Ct. at 1220. But the thrust of his argument (Br. 22-25) is that the Court should essentially abandon that definition. He provides no sound reason for this Court to do so.

1. *Johnson*'s definition of "physical force" in terms of its "capab[ility]" to cause pain or injury, 559 U.S. at 140, reflects the elements clause's focus on the criminal acts themselves, rather than their result. The elements clause applies to offenses that have the "use * * * of physical force against the person of another" as an element, 18 U.S.C. 924(e)(2)(B)(i), irrespective of whether the offense requires the actual causation of pain or bodily injury. Because force that *does* cause harm is necessarily *capable* of causing harm, an offense's inclusion of a causation requirement may in itself be sufficient to show that the crime requires the "use of physical force." See *Castleman*, 134 S. Ct. at 1416-1417 (Scalia, J., concurring in part and concurring in the judgment) ("[I]t is impossible to cause bodily injury without using force 'capable of' producing that result."). But as *Johnson*

recognized, the ACCA's reference to the "use of physical force" focuses on the capability of the force to cause such harm, irrespective of the outcome. A boxer, for example, engages in the "use of physical force" when he throws a punch, even if his opponent is skillful enough to deflect it without suffering pain or injury.

Petitioner errs in arguing (Br. 12, 22-25) that the operative language from *Johnson* would be "limitless" unless it is reformulated. Even if "all force is potentially capable of causing pain or injury in some situations," Pet. Br. 12 (emphasis omitted), the question is whether such capability is an "element" of the crime at issue, 18 U.S.C. 924(e)(2)(B)(i); see *Johnson*, 559 U.S. at 137 (focusing on the force inherent in "the least of the[] acts" that would suffice for conviction of the offense). Thus, in *Johnson* itself, the Court found that a battery offense that could be committed through "*any* intentional physical contact" with an unwilling person, "'no matter how slight,'" did not categorically require the "'physical force'" contemplated by the elements clause. 559 U.S. at 138 (citations omitted); see *id.* at 136, 145. The outcome could be different, however, for an offense with a narrower force element—*e.g.*, one that requires stronger physical contact, or that requires that the action in fact result in pain or injury. Cf. *Castleman*, 134 S. Ct. at 1413 (acknowledging that *Johnson* does not address the latter type of offense).[2]

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[2] As the Court recognized in *Castleman*, which addressed 18 U.S.C. 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence," the phrase "use * * * of physical force" does not limit the relevant "force" to the defendant's own physical acts, but instead includes "indirect" force as well. See 134 S. Ct. 1409, 1415. In a poisoning case, for example, the "'use of force' * * * is not the

The Florida robbery offense here contains the sort of limitations that were absent from the battery offense at issue in *Johnson*. Unlike that battery offense, Florida robbery cannot be committed through the "most 'nominal contact,' such as a 'tap on the shoulder without consent,'" *Johnson*, 559 U.S. at 138 (brackets, citation, and ellipsis omitted). Instead, it requires "force sufficient to overcome the victim's resistance." *Robinson*, 692 So. 2d at 887. That the definition in *Johnson* encompasses such force does not render it all-inclusive. A defendant who simply taps someone on the shoulder, in a context in which no pain or injury can result, does not employ "force capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140. A defendant who engages in a physical struggle to secure or retain possession of a stolen item, however, does. An offense that can be committed in the former manner is thus not a violent felony under the elements clause. But an offense that categorically requires the latter is.

2. Petitioner's suggestion that the Court deviate from *Johnson*'s definition of "physical force," and hold that Florida robbery is not an ACCA predicate, is unsound.

Petitioner first highlights (Br. 22) *Johnson*'s observation that "[e]ven by itself, the word 'violent,'" in the

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act of 'sprinkling' the poison; it is the act of employing poison knowingly to cause physical harm." *Id.* at 1415 (brackets omitted). Likewise, when a defendant shoots someone with a gun, the requisite force occurs not when the defendant "pull[s] the trigger," but when the bullet "actually strikes the victim." *Ibid.* Every regional court of appeals (except for one that is currently considering the issue en banc) has applied that logic beyond the context of Section 921(a)(33)(A) itself. See Br. in Opp. at 9-11 & n.2, *Rodriguez* v. *United States*, No. 17-8881 (July 11, 2018).

context of defining the phrase "*violent* felony," "connotes a substantial degree of force," 559 U.S. at 140. That observation, however, was an explanation of, not a substitute for, the Court's definition of "physical force" as "force capable of causing physical pain or injury to another person." *Ibid.* That definition elucidates how "substantial" the force must be. *Ibid.* Replacing the more precise definition with one that turns on the word "substantial" alone would produce unwarranted indeterminacy in the application of the ACCA. And it would not even make a difference here, as nothing suggests that the force inherent in Florida robbery is insubstantial.

Petitioner next suggests (Br. 23) that "physical force" under the elements clause should "mean a degree of force reasonably expected to cause pain or injury." The Court in *Johnson*, however, was well aware of that possible formulation, see 559 U.S. at 143, because Congress used similar language in a nearby statutory provision, 18 U.S.C. 922(g)(8)(C)(ii). The Court's decision to provide a different formulation for the definition of "physical force" under the elements clause was presumably intentional. As petitioner points out, *Johnson* declined to hold that Congress *itself* necessarily intended all differences in language between the elements clause and Section 922(g)(8)(C)(ii) as differences in meaning. See 559 U.S. at 143. But unlike Congress, the Court in *Johnson* had the "reasonably * * * expected" language in front of it and decided not to use it. *Ibid.* (noting that the "reasonably * * * expected" language postdated the elements clause by eight years) (citation omitted). In any event, a distinction between "capable" and "reasonably expected" is not clearly implicated by the Florida robbery offense at issue here, which requires a physical struggle that could reasonably be expected to

cause pain or injury, even if it does not have that result in every case.

Finally, petitioner contends (Br. 24-25) that *Johnson* implicitly adopted a definition of "physical force" from the Seventh Circuit's decision in *Flores* v. *Ashcroft*, 350 F.3d 666 (2003), which was cited approvingly in *Johnson*, 559 U.S. at 140. In particular, he reads *Johnson* to have silently incorporated *Flores*'s suggestion that "[t]he way" to "avoid collapsing the distinction between violent and non-violent offenses" is to "insist that the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so." *Flores*, 350 F.3d at 672. But the Court in *Johnson* did not repeat that statement or otherwise "endors[e] that dividing line," Pet. Br. 25. Instead, as the Court recognized last Term, *Johnson* "made clear that 'physical force' means 'force capable of causing physical pain or injury.'" *Dimaya*, 138 S. Ct. at 1220 (quoting *Johnson*, 559 U.S. at 140). Accordingly, since *Johnson*, the Seventh Circuit itself has applied *Johnson*'s test, not *Flores*'s. See *Douglas* v. *United States*, 858 F.3d 1069, 1071 (opinion by author of *Flores* recognizing that *Johnson*'s definition is controlling), cert. denied, 138 S. Ct. 565 (2017).

The definition found in *Flores* is flawed in any event. By defining "physical force" partly in terms of whether "bodily injury" was "intended," *Flores* makes relevant the defendant's *mens rea*. 350 F.3d at 672. In construing the phrase "use * * * of physical force" in similar statutes, however, this Court has made clear that it is the word "use," not "physical force," that may require an inquiry into *mens rea*. See *Voisine*, 136 S. Ct. at 2279 (concluding that the word "use" in 18 U.S.C. 921(a)(33)(A) is "indifferent as to whether the actor has the mental

state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct"); *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (concluding that the word "use," within the context of 18 U.S.C. 16(a), "most naturally suggests a higher degree of intent than negligent or merely accidental conduct"). And this Court has expressly declined to construe the word "use" in a similar context to apply only to "intentional" behavior. *Voisine*, 136 S. Ct. at 2278-2279. *Flores* thus erred in making the defendant's intent a part of the definition of "physical force."

Although *Flores* also provided a somewhat more objective backstop to its formulation—requiring that the force "at a minimum" be "likely" to "cause bodily injury," 350 F.3d at 672—that fallback definition does not help petitioner. To the extent that the Court in *Johnson* was focused on that language, the different language that the Court itself employed—which uses the term "capable" rather than "likely," and includes "pain" as well as "injury," 559 U.S. at 140—is either a more detailed version of *Flores*'s formulation or else a deliberate modification of it. Either way, *Johnson* cannot be read as preferring the Seventh Circuit's terminology, or substantive approach, to its own.

3. To the extent that petitioner relies (Br. 26) on this Court's subsequent decision in *United States* v. *Castleman*, *supra*, to support a narrowing construction of *Johnson*, that reliance is misplaced.

Castleman addressed the application of 18 U.S.C. 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence," which employs terminology similar to the ACCA's elements clause. See *Castleman*, 134 S. Ct. at 1409. In construing that provision, the Court noted

the possibility that "[m]inor uses of force may not constitute 'violence' in the generic sense" and observed that the Seventh Circuit in *Flores* had considered "'a squeeze of the arm that causes a bruise'" to be "'hard to describe as violence.'" *Id.* at 1412 (quoting *Flores*, 350 F.3d at 670) (brackets, ellipsis, and internal quotation marks omitted). But the Court expressly declined to decide whether "'a cut, abrasion, [or] bruise'" would "necessitate violent force, under *Johnson*'s definition of that phrase." *Id.* at 1414 (citation omitted); see *id.* at 1413 (explaining that "[w]hether or not the causation of bodily injury necessarily entails violent force" is "a question we do not reach").

In fact, the only Justice in *Castleman* who did address that question recognized that such circumstances *would* require "physical force" within the meaning of *Johnson*. 134 S. Ct. at 1416-1417 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia, who treated the elements clause and Section 921(a)(33)(A) congruently, rejected the contention that "one can inflict all sorts of minor injuries—bruises, paper cuts, etc.—by engaging in *nonviolent* behavior." *Id.* at 1417. Under *Johnson*, he explained, "physical force" means "force capable of causing physical pain or injury, serious or otherwise." *Ibid.* And he reasoned that because "'hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling'" are all "capable of causing physical pain or injury," they all qualify as "physical force" under *Johnson*. *Id.* at 1421 (brackets and citation omitted); see *id.* at 1421 n.9 (explaining that "'*painful* pinching or squeezing'" satisfies "*Johnson*'s definition of 'physical force'") (citation omitted).

4. At bottom, petitioner's reinterpretation of "physical force" has little, beyond narrowness, to recommend

it. Petitioner does not purport to ground it in the text or history of the ACCA, but instead offers (Br. 41-44) only the assertion that Florida robbery does not involve the type of conduct that one "normally" associates with "armed career criminals." Br. 43 (citation and internal quotation marks omitted). That assertion, however, cannot be squared with the substantial evidence that Congress in fact viewed robbery—and, in particular, robbery the way Florida defines it—as the paradigmatic elements-clause offense. See pp. 14-18, *supra*. Petitioner does not take the view that the force required for Florida's robbery offense is unusually minor relative to other States' robbery offenses, and he provides no explanation for why the elements clause would exclude all but a handful of state non-aggravated robbery-by-force offenses. Nor does he clearly explain which crimes he *does* think would be covered, or when the ACCA's force definition would in fact be satisfied.

A construction of the elements clause that accords with the line that the common law has long drawn between the minimal and nonviolent force required for larceny or theft, and the violent force necessary for robbery, rests on a solid legal foundation. It is consistent with *Johnson*, grounded in common law of which Congress would presumably have been aware, and readily administrable. See pp. 11-18, 20-22, *supra*. Petitioner's underdeveloped alternatives have none of those virtues, and the difficulties of application would be acute. For example, petitioner acknowledges (Br. 12) that "a slap in the face might involve '*violent* force,'" but argues (Br. 14) that a "bruising squeeze of the arm" would not. Thus, in his view, "the dividing line between violent and non-violent 'force' lies somewhere between a slap to the face and a bruising squeeze of the arm." Cert. Reply

Br. 14. He fails to specify where, and it is difficult to imagine a form of words that could.

Requiring courts to ask whether something is more like a "slap" or more like a "squeeze" is unlikely to yield determinate results. And layering on adjectives, such as whether the degree of force is "minor" as opposed to "substantial," is unlikely to achieve consistency in judicial decisionmaking. The far better approach—as illustrated by Justice Scalia's straightforward application of *Johnson* to a wide range of scenarios in *Castleman*—is the one that the Court has already adopted. See 134 S. Ct. at 1417 (Scalia, J., concurring in part and concurring in the judgment); see *id.* at 1421 & n.9. The Court should adhere to it.

C. This Court Should Not Adopt Petitioner's Expansive Interpretation Of Florida Robbery

Petitioner's argument in this case rests not only on a narrow construction of the ACCA's elements clause, but also a broad construction of the Florida robbery offense underlying his prior conviction. But any disagreement that petitioner may have with the lower courts' interpretation of Florida law does not warrant this Court's review. The Supreme Court of Florida has the definitive role in interpreting that State's robbery offense, see *Johnson*, 559 U.S. at 138, and this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988); see also, *e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004). Petitioner provides no reason to deviate from that practice in this case, so unless petitioner can identify an error in the lower courts' interpretation of the ACCA's elements clause, this Court should affirm the judgment below.

In any event, none of petitioner's state-law arguments undercuts the court of appeals' determination that Florida robbery's requirement of "'resistance by the victim that is overcome by the physical force of the offender'" "satisfies the elements clause." J.A. 31 (quoting *Robinson*, 692 So. 2d at 886).

1. Petitioner argues (Br. 35) that "the degree of force necessary to overcome resistance" in a Florida robbery crime may itself be "slight" where the resistance is "slight." He points specifically (Br. 34-36) to three cases in which a defendant was convicted of Florida robbery for grabbing money out of a victim's hand. In each of the cases on which petitioner relies, however, the evidence showed that the defendant used force capable of causing physical pain or injury.

In *Sanders* v. *State*, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000), the victim was "clutching * * * his bills in his fist" when the defendant "grabbed [the victim's] fingers" and "peel[ed] [them] back in order to get the money." *Id.* at 507. "Pr[ying] open" someone's fingers "with force" sufficient to overcome his efforts to keep hold of an object, *ibid.*, involves no less force than a slap to the face, *Johnson*, 559 U.S. at 143, and is just as capable of inflicting pain.

Similarly, in *Johnson* v. *State*, 612 So. 2d 689 (Fla. Dist. Ct. App. 1993), the victim was holding cash in her "closed right fist" when the defendant "reached across her shoulder, 'raked' her hand and grabbed the money," "tear[ing] a scab off [the victim's] finger" in the process. *Id.* at 690. The defendant thus "cause[d] slight injury to [the victim's] hand." *Id.* at 691. The resulting injury confirms that the force used was "'capable of' producing that result," *Castleman*, 134 S. Ct. at 1417 (Scalia, J., concurring in part and concurring in the judgment).

Finally, in *State* v. *Dawkins*, the arrest affidavit stated that the victim was holding bills in her hand when the defendant grabbed them; the victim resisted by pulling back and refusing to let go of the money; and one of the bills was torn apart during the ensuing struggle. Pet. Br. App. 8a. Petitioner does not identify any judicial decision finding the facts set forth in that affidavit sufficient to establish robbery by force or violence under Florida law. But even assuming those facts reflect the complete factual basis for the defendant's plea to that offense, they do not illustrate that Florida robbery can be committed without the use of physical force. Force sufficient to wrench paper money from a victim's clutches (or to tear it) is not "slight," *Johnson*, 559 U.S. at 138 (citation omitted), but is instead "capable of causing physical pain or injury," *id.* at 140, in the course of the tug-of-war. See, *e.g.*, *Benitez-Saldana*, 67 So. 3d at 322 (injury in tug-of-war over purse).[3]

Florida courts have differentiated the force involved in wresting something from the grasp of an unrelenting victim—at issue in all three cases on which petitioner relies—from the minimal force involved in a simple snatching. In *Goldsmith* v. *State*, 573 So. 2d 445 (Fla. Dist. Ct. App. 1991), for example, the defendant "snatched a ten-dollar bill from [the victim's] hand and ran." *Id.* at 445. The court held that "[t]he slight force

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[3] To the extent that petitioner focuses (Br. 34) on the absence of direct physical contact between the defendant and the victim, he fails to explain why such contact is necessary to constitute the "use of physical force." See *Castleman*, 134 S. Ct. at 1415; p. 21 n.2, *supra*. Such contact is not a prerequisite to applying physical force directly (as by hitting the victim with a bat) or "indirectly" (as by "pulling the trigger on a gun"). *Castleman*, 134 S. Ct. at 1415. Indeed, if "touch[ing] the victim" were required, Pet. Br. 34, "physical force" would not even encompass shooting the victim.

used by [the defendant] to remove the bill from [the victim's] hand [wa]s *insufficient* to constitute the crime of robbery." *Ibid.* (emphasis added). Petitioner thus errs in asserting that Florida's robbery statute "can be violated by even the slightest use of force," Pet. Br. 33, and that its "force" element fails to distinguish "'violent'" offenses from "non-violent" ones, *id.* at 36 (quoting *United States* v. *Geozos*, 870 F.3d 890, 900 (9th Cir. 2017)).

2. Petitioner separately observes (Br. 27) that although Florida's robbery statute requires that the "use of force" occur "in the course of the taking," the statute was amended in 1987 to provide that "[a]n act shall be deemed 'in the course of the taking'" even if it occurs "subsequent to the taking of the property," so long as "it and the act of taking constitute a continuous series of acts or events." Fla. Stat. § 812.13(1) and (3)(b) (1995). Thus, under the law at the time of petitioner's offense (as well as today), a defendant who used "force" in fleeing with stolen property would be guilty of robbery under Section 812.13. See *Rockmore* v. *State*, 140 So. 3d 979, 982 (Fla. 2014). In that respect, Florida's robbery statute is an extension of the traditional common-law rule, which required that the force "occur prior to or contemporaneous with the taking of property." *Royal* v. *State*, 490 So. 2d 44, 45 (Fla. 1986), superseded by statute as recognized in *Robinson*, 692 So. 2d at 886 n.9.

The timing of the force, however, is irrelevant to the application of the ACCA's elements clause. All that matters is that the "use * * * of physical force" is an "element" of the state offense, without regard to its temporal proximity to other offense elements. 18 U.S.C. 924(e)(2)(B)(i). And the force required for a post-taking

struggle in a Florida robbery offense is the same as the force required for a struggle that is contemporaneous with the taking—namely, "force sufficient to overcome a victim's resistance." *Robinson*, 692 So. 2d at 887; see, *e.g.*, *Rumph*, 544 So. 2d at 1151 (defendant "push[ed] [the victim] out of the way as he bolted through the front door").[4] Thus, to the extent that petitioner contends (Br. 38-39, 42-43) that Florida's robbery statute is overbroad because the "use of force" may occur subsequent to the taking, that contention is mistaken.

3. Petitioner asserts (Br. 37-41) that the government has "acknowledged" that other States' robbery laws—which he contends are "materially indistinguishable from" or require "more forc[e]" than Florida's—do not satisfy the ACCA's elements clause. That assertion is mistaken.

In its brief in opposition, the government observed that "[s]ome courts of appeals have determined that a State's definition of robbery does not satisfy the ACCA's elements clause." Br. in Opp. 14. The government argued, however, that those decisions did not reflect "any disagreement" with the court of appeals in this case "about the meaning of 'physical force' under *Johnson*"; rather, the government contended, the other courts of appeals had "understood" other States' robbery laws to require a lesser degree of force than Florida's. *Ibid.*

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[4] Contrary to petitioner's contention (Br. 33-34), *Colby* v. *State*, *supra*, does not suggest that only minimal force is necessary for a Florida robbery conviction in circumstances involving an escape. The victim in that case had "caught the [perpetrator's] arm or hand" and had "held it," leading to "a struggle" "in which the parties clinched." *Colby*, 35 So. at 190 (noting a policeman's account that the parties "appeared to be tussling with each other"). Prevailing in such a "tussling or clinching" with another person, *ibid.*, requires using force at least equivalent to a slap in the face.

For example, the government explained that the Sixth Circuit in *United States* v. *Yates*, 866 F.3d 723 (2017), had "understood Ohio law to require only * * * 'the force inherent in a purse-snatching incident,'" Br. in Opp. 14-15 (quoting *Yates*, 866 F.3d at 732); see also *id.* at 14 (discussing the Fourth Circuit's interpretation of state law in *United States* v. *Gardner*, 823 F.3d 793 (2016), and *United States* v. *Winston*, 850 F.3d 677 (2017)). In Florida, by contrast, the force inherent in such a "sudden snatching" would not be sufficient under Section 812.13. *Robinson*, 692 So. 2d at 887. The government thus argued (Br. in Opp. 14) that "differences in how States define robbery," as "understood" by those courts of appeals, explained why robbery had been deemed a "violent felony" in some States but not in others.

Contrary to petitioner's contention (Br. 37), however, the government did not (and does not) acknowledge that the courts of appeals in those cases all interpreted state law correctly or reached the correct result. A robbery offense like Florida's, which tracks the common-law distinction between violent force and the lesser force required for theft or larceny, is a violent felony under the ACCA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2018

APPENDIX A

1. 18 U.S.C. 924 provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party,

other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951

et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the

same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

2. Fla. Stat. § 812.13 (1995) provides:

Robbery.—

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other

weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

APPENDIX B

State Non-Aggravated Robbery-by-Force Offenses at the Time of 18 U.S.C. 924(e)(2)(B)(i)'s Enactment (Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39)

States adhering to the common-law definition of force (*i.e.*, force overcoming a victim's resistance) or similar definition:

Alabama: Ala. Code § 13A-8-43(a)(1) (1982) (defining robbery as involving the "[u]se[]" of "force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance").

Alaska: Alaska Stat. § 11.41.510(a)(1) (1983) (defining robbery as involving the "use[]" of "force" "with intent to * * * prevent or overcome resistance to the taking of the property or the retention of the property after taking"); *id.* § 11.81.900(a)(22) (Supp. 1986) (defining "force" as "any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement").

Arizona: Ariz. Rev. Stat. Ann. § 13-1902(A) (1978) (defining robbery as involving the "use[]" of "force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property"); *Lear* v. *State*, 6 P.2d 426, 427 (Ariz. 1931) ("[T]he force used must be either before, or at the time of the taking, and must be of such a nature as to shew that it was intended to overpower the party

robbed, and prevent his resisting, and not merely to get possession of the property stolen.") (citation omitted).

Arkansas: Ark. Stat. § 41-2103(1) (1977) (defining robbery as involving the "employ[ment]" of "physical force upon another"); see *id.* § 41-2101 (defining "[p]hysical force" as (1) "bodily impact, restraint, or confinement," or (2) "threat thereof"); *Parker* v. *State*, 529 S.W.2d 860, 863 (Ark. 1975) ("[T]he mere snatching of money or goods from the hand of another is not robbery, unless some injury is done to the person or there be some struggle for possession of the property prior to the actual taking or some force used in order to take it.").

California: Cal. Penal Code § 211 (West 1970) (defining robbery as involving "means of force"); *People* v. *Burns*, 92 Cal. Rptr. 3d 51, 56 (Cal. Ct. App. 2009) ("All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.") (citation omitted); *People* v. *Morales*, 122 Cal. Rptr. 157, 160 (Cal. Ct. App. 1975) ("[I]t is established that something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property.").

Colorado: Colo. Rev. Stat. § 18-4-301(1) (1986) (defining robbery as involving the "use of force"); *People* v. *Borghesi*, 66 P.3d 93, 99 (Colo. 2003) (en banc) ("[T]here is no indication that the legislature has departed from the usual and customary meaning of any of the common law terms.").

Connecticut: Conn. Gen. Stat. Ann. § 53a-133 (West 1985) (defining robbery as involving the "use[]" of "physical force upon another person for the purpose of * * * [p]reventing or overcoming resistance to the taking of

the property or to the retention thereof immediately after the taking").

Delaware: Del. Code Ann. tit. 11, § 831(a)(1) (Supp. 1986) (defining robbery as involving the "use[]" of "force upon another person with intent to * * * [p]revent or overcome resistance to the taking of the property or to the retention thereof immediately after the taking").

Florida: Fla. Stat. § 812.13(1) (1985) (defining robbery as involving "force" or "violence"); *Robinson* v. *State*, 692 So. 2d 883, 887 (Fla. 1997) ("[I]n a snatching situation in Florida, force sufficient to overcome a victim's resistance is necessary to establish robbery."); *Montsdoca* v. *State*, 93 So. 157, 159 (Fla. 1922) ("All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.").

Georgia: Ga. Code Ann. § 16-8-40(a)(1) (Michie 1984) (defining robbery as involving the "use of force"); *Franklin* v. *State*, 648 S.E.2d 746, 748 (Ga. Ct. App. 2007) ("Force, in the sense in which it is used in defining the offense of robbery by this method, consists in personal violence or that degree of force that is necessary to remove articles so attached to the person or clothing as to create resistance, however slight.") (quoting *Henderson* v. *State*, 70 S.E.2d 713, 714 (Ga. 1952)) (brackets omitted).

Hawaii: Haw. Rev. Stat. § 708-841(1)(a) (Supp. 1986) (defining robbery as involving the "use[]" of "force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance").

Idaho: Idaho Code § 18-6501 (1979) (defining robbery as involving "means of force"); *State* v. *Olin*, 725 P.2d

801, 804 (Idaho Ct. App. 1986) (explaining that Idaho's robbery statute is "subject to the general rule that common law terminology will be given its common law meaning, unless a contrary legislative intent appears"), appeal denied, 735 P.2d 984 (Idaho 1987) (per curiam).

Illinois: Ill. Rev. Stat. ch. 38, para. 18-1(a) (1985) (defining robbery as involving the "use of force"); *People* v. *Bowel*, 488 N.E.2d 995, 997 (Ill. 1986) ("[T]he degree of force necessary to constitute robbery must be such that the power of the owner to retain his property is overcome, either by actual violence physically applied, or by putting him in such fear as to overpower his will.") (citation omitted; brackets in original).

Indiana: Ind. Code. § 35-42-5-1(1)(1) (Supp. 1986) (defining robbery as involving the "us[e]" of "force on any person"); *Maul* v. *State*, 467 N.E.2d 1197, 1199 (Ind. 1984) ("We have held that the degree of force used to constitute the crime of robbery has to be a greater degree of force than would be necessary to take possession of the victim's property if no resistance was offered and that there must be enough force to constitute violence.").

Kansas: Kan. Stat. Ann. § 21-3426 (1981) (defining robbery as involving "force"); *State* v. *Aldershof*, 556 P.2d 371, 375 (Kan. 1976) ("[R]obbery is not committed where the thief has gained peaceable possession of the property.").

Kentucky: Ky. Rev. Stat. Ann. § 515.030(1) (Michie 1985) (defining robbery as involving the "use[]" of "physical force upon another person"); see *id.* § 515.010 (defining "[p]hysical force" as "force used upon or directed toward the body of another person"); *Bumphis* v. *Commonwealth*, 235 S.W.3d 562, 565 (Ky. Ct. App. 2007)

("[A] charge of robbery is established when a defendant, in the course of committing a theft, exercises or threatens physical force * * * in an effort to prevent or otherwise overcome resistance exerted by the victim."), overruled on other grounds by *Hobson* v. *Commonwealth*, 306 S.W.3d 478 (Ky. 2010).

Louisiana: La. Rev. Stat. Ann. § 14:65(A) (West 1986) (defining robbery as involving the "use of force"); *State* v. *Leblanc*, 506 So. 2d 1197, 1200 (La. 1987) ("[T]he crime of robbery contemplates that some energy or physical effort will be exerted in the 'taking' element of the crime and that some additional 'use of force' in overcoming the will or resistance of the victim is necessary to distinguish the crime of robbery from the less serious crime of theft, as defined by La.R.S. 14:67.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(B)-(C) (West 1983) (defining robbery as involving the "use" of "physical force on another" with "the intent" to "prevent or overcome resistance to the taking of the property, or to the retention of the property immediately after the taking," or to "compel the person in control of the property to give it up or to engage in other conduct which aids in the taking or carrying away of the property").

Maryland: *Williams* v. *State*, 490 A.2d 1277, 1280 (Md. 1985) ("Robbery is a common law offense in Maryland and * * * is defined as the felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear."); *Cooper* v. *State*, 265 A.2d 569, 571 (Md. Ct. Spec. App. 1970) ("[S]ufficient force must be used to overcome resistance.").

Michigan: Mich. Comp. Laws § 750.530 (1981) (defining robbery as involving "force and violence"); *People* v. *Randolph*, 648 N.W.2d 164, 167 (Mich. 2002) ("Michigan's unarmed robbery statute is derived from the common law."), superseded by statute as recognized in *People* v. *March*, 886 N.W.2d 396, 404 n.5 (Mich. 2016).

Minnesota: Minn. Stat. § 609.24 (1986) (defining robbery as involving the "use[] of "force against any person to overcome the person's resistance or powers of resistance").

Mississippi: Miss. Code Ann. § 97-3-73 (1973) (defining robbery as involving "violence"); *Chaney* v. *State*, 739 So. 2d 416, 418 (Miss. Ct. App. 1999) (explaining that robbery "does not include stealth" and that "[p]ickpocket offenses are generally prosecuted under larceny statutes because of the lack of violence").

Missouri: Mo. Rev. Stat. § 569.030(1) (1986) (defining robbery as involving "forcibly steal[ing]"); see *id.* § 569.010(1) defining "[f]orcibly steals" to include "us[ing] * * * physical force upon another person for the purpose of * * * [p]reventing or overcoming resistance to the taking of the property") (emphasis omitted).

Nebraska: Neb. Rev. Stat. § 28-324(1) (1985) (defining robbery as involving a taking of property "forcibly and by violence"); *State* v. *Sutton*, 368 N.W.2d 492, 495 (Neb. 1985) ("The force relied upon must be sufficient to effect a transfer of the property from the victim to the robber, and if it is sufficient to overcome resistance, the degree is immaterial.").

Nevada: Nev. Rev. Stat. Ann. § 200.380(1) (Michie 1986) (defining robbery as involving "means of force or violence" to "obtain or retain possession of the property"

or "prevent or overcome resistance to the taking"); *Barkley* v. *State*, 958 P.2d 1218, 1219 (Nev. 1998) (per curiam) (concluding that an "unlawful taking became a robbery" when the defendant struck the victim "in the head with the bottle, thereby using force and violence to retain possession of the bottle").

New Hampshire: N.H. Rev. Stat. Ann. § 636:1(I)(a) (1986) (defining robbery as involving the "[u]se[] of "physical force on the person of another and such person is aware of such force"); *State* v. *Goodrum*, 455 A.2d 1067, 1068 (N.H. 1983) (per curiam) ("It is clear that a pickpocket who merely 'snatches' a wallet without using force of which the victim is aware has committed a theft but not a robbery.") (citation omitted).

New Jersey: N.J. Stat. Ann. § 2C:15-1(a)(1) (West 1982) (defining robbery as involving the "use[] of "force upon another"); *State* v. *Sein*, 590 A.2d 665, 668 (N.J. 1991) (holding that the "Legislature intended to adopt the majority rule" that "there is insufficient force to constitute robbery when the thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking").

New Mexico: N.M. Stat. Ann. § 30-16-2 (Michie 1984) (defining robbery as involving "use * * * of force or violence"); *State* v. *Curley*, 939 P.2d 1103, 1105 (N.M. Ct. App. 1997) ("[W]hen property is attached to the person or clothing of a victim so as to cause resistance, any taking is a robbery, and not larceny, because the lever that causes the victim to part with the property is the force that is applied to break that resistance; however, when no more force is used than would be necessary to remove property from a person who does not resist, then the offense is larceny, and not robbery.").

New York: N.Y. Penal Law § 160.00(1) (McKinney 1975) (defining robbery as involving the "use[] of "physical force upon another person for the purpose of * * * [p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking").

North Carolina: *State* v. *Smith*, 292 S.E.2d 264, 270 (N.C.) ("Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear."), cert. denied, 459 U.S. 1056 (1982); *State* v. *Robertson*, 531 S.E.2d 490, 493 (N.C. Ct. App. 2000) ("To constitute the crime of highway robbery, the force used must be either before or at the time of the taking, and must be of such a nature as to show that it was intended to overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen.") (quoting *State* v. *John*, 50 N.C. (5 Jones) 163, 169 (1857)) (per curiam) (emphasis omitted).

Ohio: Ohio Rev. Code Ann. § 2911.02(A) (Anderson Supp. 1985) (defining robbery as involving the "use" of "force against another"); see *id.* § 2901.01(A) (defining "[f]orce" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing"); *State* v. *Carter*, 504 N.E.2d 469, 470-471 (Ohio Ct. App. 1985) (explaining that the "type of force envisioned by the legislature * * * is that which poses actual or potential harm to a person," while finding it "unnecessary" to determine whether "a showing of resistance by the victim * * * is required"); *State* v. *Furlow*, 608 N.E.2d 1112, 1113-1114 (Ohio Ct. App. 1992) (explaining that "the force required for robbery re-

quires actual or potential harm" and reversing a robbery conviction for wallet-snatching that failed to satisfy that standard).

Oklahoma: Okla. Stat. tit. 21, § 792 (1982) (defining robbery as involving the "employ[ment]" of "force" "either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking"); *Snake* v. *State*, 453 P.2d 287, 290 (Okla. Crim. App. 1969) (explaining that Oklahoma's robbery statute does "not obviate the necessity of showing that force overcoming resistance was employed either in taking the property from the victim or retaining it"); *Ellis* v. *State*, 260 P. 93, 95 (Okla. Crim. App. 1927) ("Merely snatching the property from the person of another, without violence or putting in fear, is not robbery, except where there is some injury or violence to the person of the owner, or where the property snatched is so attached to the person or clothes of the owner as to afford resistance.") (citation omitted).

Oregon: Or. Rev. Stat. § 164.395(1)(a) (1985) (defining robbery as involving the "use[]" of "physical force upon another person with the intent of * * * [p]reventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(v) (1983) (defining robbery as involving "physically tak[ing] or remov[ing] property from the person of another by force however slight"). *Commonwealth* v. *Brown*, 484 A.2d 738, 741 (Pa. 1984) ("Any injury to the victim, or any struggle to obtain the property, or any resistance on his part which requires a greater counter attack to

effect the taking is sufficient."); *id.* at 742 (distinguishing the robber from "the pickpocket").

Rhode Island: R.I. Gen. Laws § 11-39-1 (1981) (prescribing penalties for robbery). *State* v. *Robertson*, 740 A.2d 330, 333 (R.I. 1999) ("This Court has long held that the statute incorporates the common-law definition of robbery. Under common law, robbery consists of the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear.") (citations and internal quotation marks omitted); *ibid.* (concluding that "a snatching involves sufficient force to support a conviction of robbery if the article taken is so attached to the person or the clothes of the victim as to afford resistance").

South Carolina: *State* v. *Drayton*, 361 S.E.2d 329, 335 (S.C. 1987) ("Robbery is defined as the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.") (citing *State* v. *Hiott*, 276 S.E.2d 163 (S.C. 1981)), cert. denied, 484 U.S. 1079 (1988); see *State* v. *Bland*, 457 S.E.2d 611, 612-613 (S.C. 1995) (distinguishing robbery from purse-snatching).

South Dakota: S.D. Codified Laws § 22-30-2 (1979) (defining robbery as involving the "employ[ment]" of "force" "to obtain or retain possession of the property or to prevent or overcome resistance to the taking"); *State* v. *Stecker*, 108 N.W.2d 47, 50 (S.D. 1961) ("The stealthy or secret taking of property from the person of another before the victim is aware of what is being done is not robbery.").

Tennessee: Tenn. Code Ann. § 39-2-501(a) (1982) (defining robbery as involving "violence"); *State* v. *Fitz*, 19 S.W.3d 213, 217 (Tenn. 2000) ("A theft of a wallet from the pocket or purse of an unknowing or unresisting victim, for example, may require 'compulsion by the use of physical power' but not violence.").

Utah: Utah Code Ann. § 76-6-301(1) (1978) (defining robbery as involving "means of force"); *State* v. *Germonto*, 868 P.2d 50, 56 (Utah 1993) (determining that the defendant applied force in hitting the victim with a wrench).

Virginia: *Pierce* v. *Commonwealth*, 138 S.E.2d 28, 31 (Va. 1964) (defining "[r]obbery at common law" as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation"); *Maxwell* v. *Commonwealth*, 183 S.E. 452, 454 (Va. 1936) ("To constitute this offense, there must be (1) violence, but it need only be slight, for anything which calls out resistance is sufficient.") (citation omitted); *Winn* v. *Commonwealth*, 462 S.E.2d 911, 913 (Va. Ct. App. 1995) (holding that a purse-snatching was not robbery because the defendant used only "the force necessary to remove the purse from the victim's shoulder, not the force associated with violence against or resistance from the victim").

Washington: Wash. Rev. Code § 9A.56.190 (1985) (defining robbery as involving the "use * * * of immediate force" or "violence" to "obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial"); *State* v. *Austin*, 373 P.2d 137, 140 (Wash. 1962) (explaining that a jury instruction correctly stated the law in distinguishing robbery from

a "snatching or sudden taking * * * accomplished without force or violence") (citation omitted).

West Virginia: *State* v. *Harless*, 285 S.E.2d 461, 463-464 (W. Va. 1981) (adopting the common-law definition of robbery and explaining that, "at common law, robbery could be accomplished either by actual physical force or violence inflicted on the victim or by intimidating the victim by placing him in fear of bodily injury").

Wisconsin: Wis. Stat. Ann. § 943.32(1)(a) (West 1982) (defining robbery as involving the "us[e]" of "force against the person of the owner with intent thereby to overcome his physical resistance or physical power of resistance to the taking or carrying away of the property").

States defining force more broadly than the common law, to encompass simple purse-snatchings:

District of Columbia: D.C. Code Ann. § 22-2901 (1981) (defining robbery as involving "force or violence, whether against resistance or by sudden or stealthy seizure or snatching").

Iowa: Iowa Code § 711.1(1) (1985) (defining robbery as involving "an assault upon another"); see *id.* § 708.1(1) (defining assault as including any act "which is intended to result in physical contact which will be insulting or offensive to another").

Massachusetts: Mass. Gen. L. ch. 265, § 19(b) (1985) (defining robbery as involving "force and violence"); *Commonwealth* v. *Mora*, 77 N.E.3d 298, 306 (Mass. 2017) ("[T]he victim need not resist."); *Commonwealth* v. *Jones*, 283 N.E.2d 840, 845 (Mass. 1972) ("Snatching necessarily involves the exercise of some actual force.

* * * [W]here, as here, the actual force used is sufficient to produce awareness, although the action may be so swift as to leave the victim momentarily in a dazed condition, the requisite degree of force is present to make the crime robbery.").

States defining force more narrowly than the common law, to require causation of bodily injury:

Montana: Mont. Code Ann. § 45-5-401(1)(a) (1985) (defining robbery as involving the "inflict[ion]" of "bodily injury upon another").

North Dakota: N.D. Cent. Code § 12.1-22-01(1) (1985) (defining robbery as involving the "inflict[ion]" of "bodily injury upon another").

Texas: Tex. Penal Code Ann. § 29.02(a)(1) (West 1974) (defining robbery as involving the "caus[ation]" of "bodily injury to another").

Vermont: Vt. Stat. Ann. tit. 13, § 608(a) (1974) (defining robbery as involving "assault[]"); *id.* § 1023(a)(2) (defining assault as, *inter alia*, "caus[ing] bodily injury to another"); see *id.* § 1021(1) (defining "[b]odily injury" as "physical pain, illness or any impairment of physical condition").

Wyoming: Wyo. Stat. § 6-2-401(a)(i) (1983) (defining robbery as involving the "[i]nflict[ion]" of "bodily injury upon another").

No. 17-5554

In The Supreme Court of the United States

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A straightforward application of *Curtis Johnson v. United States*, 559 U.S. 133 (2010) resolves this case. According to *Curtis Johnson*, "physical force" in 18 U.S.C. § 924(e)(2)(B)(i) means "*violent* force." 559 U.S. at 140. And Florida robbery lacks "*violent* force" "as an element" because Florida courts require only slight force to overcome a victim's slight resistance. Unable to dispute that conclusion, the government attempts to re-litigate *Curtis Johnson* in three respects.

First, although the Court in *Curtis Johnson* found the meaning of "physical force" to be "clear" in the context of a statutory definition of "*violent* felony," 559 U.S. at 140, the government asks the Court to reinterpret that clear statutory language in light of the ACCA's legislative history. But where "the statutory language is plain, [the Court] must enforce it according to its terms." *King v. Burwell*, 576 U.S. ___, 135 S. Ct. 2480, 2489 (2015).

Second, although *Curtis Johnson* described "*violent* force" as a "substantial degree of force," 559 U.S. at 140, the government attempts to redefine "*violent* force" to include insubstantial, non-violent force. The government plucks a single word ("capable") out of the clause following "*violent* force" to argue that "physical force" is any force potentially capable of causing pain or injury in a hypothetical case. But because the government fails to dispute that *all* force is potentially capable of causing pain or injury in some circumstances, its expansive reading of "capable" would

vitiate not only *Curtis Johnson*'s "*violent* force" definition, but also its legal reasoning and result.

Finally, *Curtis Johnson* strictly applied the categorical approach in determining whether a state offense has "*violent* force" "as an element." The government disregards *Curtis Johnson*'s dictate that federal courts are "bound" by a state's interpretation of the elements of its own statute and must closely examine state case law to ascertain the least culpable conduct for conviction. *Id.* at 136-38. The government attempts to subvert that longstanding analytical framework by mischaracterizing Florida robbery law and equating other states' robbery-by-force offenses without scrutinizing how each state interprets the "force" element in its statute.

Despite attempting to re-litigate these aspects of *Curtis Johnson*, the government offers no reason to disturb that settled statutory precedent. Indeed, the government ignores that "[t]he principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what [this Court] ha[s] done." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. ___, 134 S. Ct. 2398, 2411 (2014) (citations omitted). The Court should reject the government's invitation to usurp that legislative function here.

ARGUMENT

A. *Curtis Johnson* Defined "Physical Force" as "*Violent* Force"

Using well-established tools of statutory construction, the Court in *Curtis Johnson* concluded that, in the "violent felony" context, "the phrase 'physical force' means *violent* force." 559 U.S. at 140 (emphasis in original). Although statutory construction begins and ends with the text when it is clear, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), the government refuses to accept that bedrock principle of statutory interpretation and the substantive construction it dictated in *Curtis Johnson*.

1. Using the legislative history as its starting point, the government highlights isolated statements from a 1981 Senate Report and a 1986 House Report to assert that Congress intended to incorporate into the ACCA's elements clause a definition of "force" derived from common law robbery. Gov't Br. 7-8, 14-18, 27. But where, as here, the text is "clear," *Curtis Johnson*, 559 U.S. at 140, legislative history has no role to play. For that reason, the Court in *Curtis Johnson* refused to rely on legislative history, even to confirm its plain-language interpretation of "physical force" as "*violent* force." *Id.* Indeed, that was so even though both parties had extensively discussed legislative history in their briefing. *See Curtis Johnson*, Pet. Br. 27-33, 2009 WL 1510257 (U.S. No. 08-6925); *Curtis Johnson*, Gov't Br. 31-37, 2009 WL 3663947 (U.S. No. 08-6925); *Curtis Johnson*, Pet. Reply Br. 21-23, 2009

WL 2919036 (U.S. No. 08-6925). The government fails to explain why the Court should now resort to legislative history to re-examine the same text it has already definitively construed and found "clear."

In any event, the government's account of the legislative history is wrong. Common law robbery had nothing to do with the ACCA's elements clause. As the government candidly conceded in *Curtis Johnson*, but acknowledges only in a footnote here (Gov't Br. 18 n.1), Congress based the ACCA's elements clause on the nearly-identical elements clause in 18 U.S.C. § 16(a), which defines "crime of violence." In its brief in *Curtis Johnson*, the government tracked the ACCA's legislative history to correctly explain that, in 1986, "Congress patterned its definition of 'violent felony' on the Section 16 definition" from 1984, using it "as its template for a new definition of ACCA predicates." *Curtis Johnson*, Gov't Br., *supra* at 32-35. That origin has not changed.

Not only does the government seek to rewrite history, but it does so by relying on legislative history of a statute Congress deliberately discarded. In the original 1984 ACCA legislation, Congress enumerated and defined "robbery," and a 1981 Senate Report indicated that the 1984 definition tracked common law robbery. But that Report specifically excluded from the definition offenses that, like Petitioner's post-1987 Florida robbery, could be committed by using force after the taking. S. Rep. No. 307, 97th Cong., 1st Sess. 671 (1981). And in any event, that definition remained in the ACCA for only two years. In 1986, Congress not only

declined to re-enact the 1984 definition; it declined to re-enumerate "robbery" altogether. And given that Congress *did* re-enumerate burglary in 1986, Congress' failure to re-enumerate robbery was deliberate. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotations and alteration omitted).

Congress' deliberate elimination of "robbery" as an enumerated ACCA predicate in 1986 likewise undermines the government's reliance on a 1986 House Report mentioning that the new elements clause "would include . . . felonies involving physical force against a person," such as "murder, rape, assault, robbery, etc. . . ." Gov't Br. 3, 16, 18 (quotation omitted). The discussion leading up to that Report makes clear that Congress' focus in 1986 was on the most violent robberies. *See* NACDL Amicus Br. 8-13. Had Congress intended to capture the majority of state robbery offenses in the 1986 amendment—irrespective of whether violence was an "element" of those offenses—Congress would have simply re-enumerated robbery, just as it did burglary. *See Taylor v. United States*, 495 U.S. 575, 589 (1990). But by eliminating robbery as an enumerated predicate in 1986, Congress confirmed that its intent with the amendment was to capture only those robberies that either had "physical force" "as an element,"

or "involve[d] a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

Indeed, as this Court has explained, and the government ignores, the *two* "violent felony" definitions enacted in 1986 reflected Congress' intent for the amended ACCA to encompass only those "offenses of a certain level of seriousness that involve violence or an inherent risk thereof," *Taylor*, 495 U.S. at 590, because only such offenses predict an "increased likelihood" of gun violence, *Begay v. United States*, 553 U.S. 137, 146-47 (2008). Despite the government's focus on legislative intent, it never once acknowledges Congress' overriding statutory purpose in 1986, as embodied in both clauses of the ACCA and recognized in this Court's precedents. *See* Pet. Br. 41-44.

Although "the best evidence of Congress' intent is the statutory text," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012), the government avoids the text at all costs. It does not even acknowledge that the residual clause was enacted with the elements clause in 1986 and provided a separate path to the enhancement. Moreover, from the selective manner in which the government discusses *Curtis Johnson*, the government also avoids the text of the elements clause and the Court's plain-meaning interpretation of "physical force" to require "*violent* force."

2. Noticeably, the government acknowledges *Curtis Johnson*'s definition of "physical force" as "*violent* force" only once. Gov't Br. 11. It skips over "*violent* force" every other time it discusses the Court's

"physical force" definition. Gov't Br. 7, 8, 10, 20. And that is telling, given that its substituted word of choice ("capable") is part of the clause explaining "*violent* force." Moreover, just as the government avoids mentioning "*violent* force," it fails to acknowledge *why* the Court found the text to "clear[ly]" require "*violent* force." *Curtis Johnson*, 559 U.S. at 140. Specifically, it minimizes (Gov't Br. 10-11) that the Court used dictionary definitions of both "force" ("strength," "energy," "active power," and "vigor") and "violent" ("extreme," "furious," "severe," "vehement," and "strong") in concluding that "physical force" within a statutory "violent felony" definition clearly requires "*violent* force." *Id.* at 139-40 (citations omitted). All of these definitions are consistent with the Court's recognition that the word "violent" in "violent felony" itself "connotes a substantial degree of force." *Id.* at 140.

It is also telling that the government does not mention that, in *United States v. Castleman*, 572 U.S. ___, 134 S. Ct. 1405 (2014), the Court not only confirmed *Curtis Johnson*'s plain-language interpretation of "physical force" as "'*violent* force,'" *id.* at 1409-10, but reiterated that "the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force,'" *id.* at 1411 (quoting *Curtis Johnson*, 559 U.S. at 140). And the government discounts *Castleman*'s clarification that "*violent* force" would exclude "[m]inor uses of force," such as "'a squeeze of the arm that causes a bruise.'" *Id.* at 1412 (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003) (alteration omitted)). Although the government prefers the view of the

lone concurrence (Gov't Br. 26, 28) that certain minor uses of force would constitute "*violent* force," *id.* at 1417, 1421 (Scalia, J., concurring in part and concurring in the judgment), the majority expressly disagreed with that portion of the concurrence, *id.* at 1412 & n.6.

The government also embraces the concurrence's separate view that causation of injury necessarily entails "*violent* force." However, the government acknowledges that the majority did not address that question, and instead left it open for a future case. *Id.* at 1413-14. And that question is not presented here for two reasons. First, causation of injury is not a required element of Florida robbery, as it was in the statute considered in *Castleman*. Second, Petitioner has identified several Florida cases where a person was convicted of robbery by "force" without causing any injury. The only question here is whether, in light of Florida case law, the minimum degree of "force" required to commit a Florida robbery amounts to "*violent* force."

3. Because Petitioner has identified several Florida robbery cases involving no pain or injury, the government attempts to re-interpret *Curtis Johnson* to encompass any force that is potentially capable of causing physical pain or injury. In effect, the government's view is that if there is a "theoretical possibility" the conduct could cause pain or injury, it satisfies the elements clause. But this Court prohibits such "legal imagination" when applying the categorical approach. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Moreover, beyond being methodologically unsound, the government's "potentially capable" rule conflicts with *Curtis Johnson*'s core reasoning. Because the government fails to dispute that "all force is potentially capable of causing pain or injury in some situations" (Gov't Br. 21), its rule would sweep in all sorts of non-violent conduct. And that would eviscerate the very distinction between violent and non-violent force *Curtis Johnson* sought to draw by defining "physical force" as "*violent* force." 559 U.S. at 140; *see Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (declining to "blur th[at] distinction" in § 16's "crime of violence" context).

The government's "potentially capable" rule is also inconsistent with *Curtis Johnson*'s result. As explained (Pet. Br. 22-23), even the offensive touching *Curtis Johnson* deemed non-violent is potentially capable of causing pain or injury in an outlier case. While the government contends that the touching in *Curtis Johnson* could occur only "in a context in which no pain or injury can result" (Gov't Br. 22), the Court did not incorporate any such limitation. Nor could there be one, given that Florida law expressly recognizes that the same offensive touching *Curtis Johnson* deemed non-violent can in some cases "cause[] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. §§ 784.041(1), 784.045(1).

Because the government's rule would encompass a tap on the shoulder with only the slightest degree of force, it also cannot be squared with the Court's repeated explanations of "*violent* force" as a "substantial

degree of force." *Curtis Johnson*, 559 U.S. at 140; *Castleman*, 134 S. Ct. at 1411. To circumvent that anomaly, the government asserts that a "substantial degree of force" serves as "an explanation of . . . 'force capable of causing physical pain or injury.'" Gov't Br. 23. To the extent that assertion suggests that "force" is "capable" of causing pain or injury only when it involves a "substantial degree of force," Petitioner agrees. However, the government adds that the "force capable" language "elucidates how 'substantial' the force must be." Gov't Br. 23. And that assertion is not only circular but nonsensical. On that view, a "substantial degree of force" would include force that is *not* substantial, since it is undisputed that all force is "potentially capable" of causing pain or injury under certain conditions. Gov't Br. 21. By unmooring the word "capable" from its context, the government strips the word "substantial" of any meaning, just as it does "*violent* force."

4. This Court has consistently cautioned that its statements must not be read "in isolation," *Endrew F. ex rel. Joseph F. v. Douglas Cnty. School Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 998 (2017), and are not "to be parsed as though we [a]re dealing with language of a statute," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). Rather, they must "be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821) (Marshall, C.J.). The government is well aware of this principle. Indeed, in *United States v. Stitt & Sims*, the

government has relied upon it to advocate against a myopic reading of the phrase "building or structure" in *Taylor*. *See* Gov't Br. 33-34, U.S. Nos. 17-765 & 17-766, 2018 WL 3155832 (June 26, 2018). The government fails to explain why the Court should apply that principle in reading *Taylor*, but ignore it in reading *Curtis Johnson*. By reading the word "capable" in isolation from "*violent* force," "substantial degree of force," and every other word in *Curtis Johnson*, the government violates this Court's express guidance on how to read its decisions.

Unlike the government, Petitioner advances a holistic interpretation of *Curtis Johnson* that accounts for *all* of the opinion, including the word "capable." The Court specifically defined "force" as an "unusual degree of strength or energy," "active power," and "vigor." *Curtis Johnson*, 559 U.S. at 139 (citations omitted). "Force" must bear that meaning when used in the phrase "force capable of causing pain of injury to another." *Id.* at 140. Moreover, that clause as a whole explains, and must be read consistently with, the "*violent* force" definition preceding it and the approving citation to *Flores* following it. *Id.*; *see Castleman*, 134 S. Ct. at 1412 (reiterating that *Curtis Johnson* "cited [*Flores*] with approval").[1] And, in the sentence immediately after the citation to *Flores*, the Court underscored that the word

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[1] Although *Curtis Johnson* and *Castleman* both approvingly cited *Flores*, the government makes no attempt to account for that approval. Instead, it criticizes the "intent" aspect of *Flores*' formulation (Gov't Br. 24-25), even though Petitioner never relied on it.

"violent" in "violent felony" alone "connotes a substantial degree of force." *Curtis Johnson*, 559 U.S. at 140. Thus, when considered in the context of that statutory language and the entire opinion, "capable" must refer to a degree of force that is "reasonably expected" to cause pain or injury.

The government suggests that, by not using the "reasonably expected" terminology in 18 U.S.C. § 922(g)(8)(C)(ii), the Court in *Curtis Johnson* intended for the ACCA's elements clause to have a different substantive meaning. But, in the same breath, the government concedes that the Court recognized "Congress *itself* [did not] necessarily intend[] all differences in language between the elements clause and Section 922(g)(8)(C)(ii) as differences in meaning." Gov't Br. 23. The government thus assumes this Court foreclosed a "reasonably expected" understanding despite recognizing Congress itself did not. And that assumption is untenable given that *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018) has bolstered the "reasonably expected" understanding. Specifically, referring to the "capable" language in *Curtis Johnson*, the Court explained in *Dimaya* that physical force must be gauged by its "likely" consequences—namely, by whether it is "likely . . . to lead to an injury." *Id.* at 1220-21.

Reading *Curtis Johnson* as a whole, and in light of both *Castleman* and *Dimaya*, it is clear that "*violent* force" means a "substantial degree of force," and that force "capable" of causing pain or injury is a degree of force "reasonably expected" or "likely" to do so. It is not

force "potentially capable" of doing so in a freakish scenario existing only in the government's "legal imagination." Petitioner's contextual reading of "capable" is faithful to *Curtis Johnson*'s "*violent* force" definition, reasoning, and result. The government's reading is not.

B. Florida Robbery Lacks "*Violent* Force" "as an Element"

1. The government attempts to re-litigate not only *Curtis Johnson*'s statutory interpretation but also its application of the categorical approach. In applying its "*violent* force" definition to Florida's simple battery offense, the Court in *Curtis Johnson* emphasized that it was "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the offense. 559 U.S. at 138. The Court therefore scrutinized state law to determine the "least of the[] acts" criminalized. *Id.* at 137. Since Florida's battery statute prohibited offensive "touching," the Court examined Florida case law to ascertain the minimum degree of force required to commit a "touching." And that examination revealed that a prosecutable touching could be committed by "any intentional physical contact, 'no matter how slight,' such as a 'tap on the shoulder without consent.'" *Id.* at 138 (quoting *State v. Hearns*, 961 So. 2d 211, 218-19 (Fla. 2007) (alterations omitted)).

That examination is standard practice. In applying the categorical approach, the Court always examines state case law to discern the meaning of a state-law element. *See, e.g.*, *Mathis v. United States*, 579 U.S.

___, 136 S. Ct. 2243, 2250, 2256 (2016) (Iowa case law established statutory alternatives were means, not elements); *Descamps v. United States*, 570 U.S. 254, 259, 264-65 (2013) (California case law established burglary did not require breaking and entering); *Moncrieffe v. Holder*, 569 U.S. 184, 194 (2013) (Georgia case law established possession with intent to distribute marijuana did not require remuneration); *James v. United States*, 550 U.S. 192, 202-03 & n.2 (2007) (Florida case law established scope of attempted burglary), *overruled on other grounds by Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 2563 (2015); *Duenas-Alvarez*, 549 U.S. at 190-93 (California case law established scope of aiding and abetting); *Leocal*, 543 U.S. at 7-8 (Florida case law established lack of *mens rea* for DUI offense).

As in these precedents, the Court here must examine Florida case law to ascertain the minimum degree of "force," Fla. Stat. § 812.13, necessary to "overcome a victim's resistance," *Robinson v. State*, 692 So. 2d 883, 886-87 (Fla. 1997). Only by identifying the least culpable manner of overcoming resistance can the Court determine whether the Florida robbery statute has "*violent* force" "as an element." Although the categorical approach is enshrined in this Court's precedents, the government never acknowledges that the categorical approach governs the analysis here. And there is a reason for that omission: Florida robbery law clearly establishes that only slight, non-violent force is needed to overcome slight resistance.

2. The government ignores the two overarching principles of Florida law that compel that conclusion. First, as the Florida Supreme Court stated nearly a century ago, "[t]he degree of force" required to commit robbery is "immaterial" provided it overcomes victim resistance. *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922). Therefore, and as that court later reiterated, "[a]ny degree of force suffices." *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976). The government fails to recognize either of these controlling statements from the Florida Supreme Court.

Second, Florida juries have been instructed for decades on the related principle that Florida "law does not require that the victim of robbery resist to *any particular extent*." Fla. Std. Jury Instr. (Crim.) 15.1 (emphasis added). Florida appellate courts have long recognized that a robbery victim may "resist[] in any degree." *S.W. v. State*, 513 So. 2d 1088, 1091 (Fla. Dist. Ct. App. 1987) (quoting *Adams v. State*, 295 So. 2d 114, 116 (Fla. Dist. Ct. App. 1974) and *Mims v. State*, 342 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977)). Although the Florida Supreme Court in *Robinson* approvingly cited Florida's standard robbery instruction, as well as *S.W.*, *Adams*, and *Mims*, *see* 692 So. 2d at 886-87, the government overlooks the established principle in Florida that "any degree of resistance" suffices, just as it overlooks the principle that "any degree of force" may overcome it. When considered together, these dual principles make clear that, when a victim's resistance is slight, the slight degree of force necessary to overcome it will suffice for a Florida robbery conviction.

These complementary legal principles are not mere abstractions in Florida. The cases cited by Petitioner confirm that individuals may be, and in fact have been, convicted of Florida robbery by using only a slight degree of force to overcome slight resistance. The government does not dispute that the Florida Supreme Court has expressly recognized that a person commits robbery (not larceny) where a pickpocket is caught in a non-forceful taking and uses force merely "to escape from the victim's grasp." *Robinson*, 692 So. 2d at 887 n.10 (citing *Colby v. State*, 35 So. 189, 190 (Fla. 1903)). Nor does the government dispute that a Florida robbery occurs where a person simply grabs cash from a victim's hand and tears a bill because the victim tightens her grip on the cash and pulls back her hand. *State v. Dawkins*, Pet. Br. App. 7a-8a. And the government likewise does not dispute that a Florida robbery (not a snatching) occurs where the defendant, in one fluid motion with one hand, momentarily peels back a victim's fingers to grab cash from the victim's closed fist. *Sanders v. State*, 769 So. 2d 506, 506-07 (Fla. Dist. Ct. App. 2000).

3. In *Colby*, *Dawkins*, and *Sanders*, the defendants used only a slight degree of force that caused no reported pain or injury. But even though the degree of force used to overcome the minimal resistance in those cases cannot plausibly be described as "substantial," "extreme," "vehement," "furious," or "severe," *Curtis Johnson*, 559 U.S. at 139-40 (citations omitted), the government maintains that it still satisfies *Curtis*

Johnson. Beyond invoking its incorrect and all-inclusive "potentially capable" standard, the government's only explanation is that the conduct in Petitioner's cases "involves no less force than a slap to the face." Gov't Br. 29, 32 n.4. That bald assertion, however, is contrary to human experience: a slap to the face involves substantial force and is thus reasonably expected to cause pain or injury; pulling away from another's grasp or grabbing a bill grasped by another does not. Indeed, such conduct did not *actually* cause any reported pain or injury in *Colby*, *Dawkins*, or *Sanders*.

That is not to say that the presence or absence of pain or injury in a real case will always be dispositive. For example, in *Winston Johnson v. State*, 612 So. 2d 689, 690-91 (Fla. Dist. Ct. App. 1993), "rak[ing]" the victim's hand incidentally caused a "slight injury" only because the victim's hand happened to have a scab on it, not because the degree of force used was substantial. Conversely, some victims may be uncommonly immune to pain or injury. To take the government's example, throwing a punch would still amount to "*violent* force" even where a victim has superb reflexes and avoids any pain or injury by deftly deflecting the punch. The degree of force used is substantial and therefore reasonably expected to cause pain or injury, even though it unexpectedly does not because of the victim's exceptional skill. A degree-of-force test respects the dividing line the Court drew between violent and non-violent force. The government's "potentially capable" test eliminates that line by sweeping everything into the

elements clause, including slight-force robberies that do not actually cause, and are not reasonably expected to cause, any pain or injury.

4. Because the minimum degree of force required by Florida robbery law is not "*violent* force" under a faithful reading of *Curtis Johnson*, the government resorts to mischaracterizing Florida law. It asserts, without support, that slight force can suffice *only* for a snatching offense (*i.e.*, where there is no victim resistance), not a robbery offense. Gov't Br. 30-31. But the legal principles articulated by the Florida courts make clear that a robbery victim may resist to *any* extent, and the degree of force required is immaterial. The line between snatching and robbery in Florida is razor thin. Indeed, the reflexive and momentary tightening of a victim's grip can spell the difference between robbery and theft. That subtle distinction also refutes the government's contention that "inherent" in every Florida robbery is a "physical contest" or "struggle," where the defendant must "overpower[] a defiant victim." Gov't Br. 7, 9, 12, 22, 32. While a physical contest or struggle may ensue where, as the government puts it, the victim is "unrelenting" (Gov't Br. 30), that heightened level of resistance is not required for every Florida robbery conviction.

Petitioner's Florida robbery cases confirm that resistance may take the form of merely tightening one's grip on a dollar bill and releasing it after only a split second. In that scenario, only a slight degree of force—not overwhelming physical domination—is necessary to overcome the victim's slight resistance. To obscure

that reality, the government exaggerates the reported conduct in *Dawkins* by describing the defendant's grabbing a bill from the victim's hand as "wrench[ing] paper money from a victim's clutches." Gov't Br. 30. And, when discussing *Sanders* (Gov't Br. 29), the government omits any mention of the fact that the seamless, momentary, one-handed finger-peeling by the defendant succeeded only because, as the court observed, the victim did not "put up greater resistance." 769 So. 2d at 507.

In a last-ditch effort to avoid the conclusion that a slight degree of force is sufficient for a Florida robbery conviction, the government asks the Court to "defer" to the Eleventh Circuit's interpretation of Florida law. Gov't Br. 8-9, 28. But no such deference is analytically possible here. In *United States v. Fritts*, 841 F.3d 937, 942-44 (11th Cir. 2016), the case relied upon below, the Eleventh Circuit did no more than recognize the unremarkable and undisputed general principle that overcoming resistance is required to commit Florida robbery. The Eleventh Circuit's state-law analysis ended there. As the Ninth Circuit correctly recognized, the Eleventh Circuit "overlooked" that, under Florida law, "the resistance itself [may be] minimal." *United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017). Indeed, the Eleventh Circuit did not examine Florida case law to ascertain the minimum degree of force required to overcome resistance. Thus, this is not a case where a court of appeals has interpreted state law in a manner at odds with a party. Rather, the Eleventh Circuit failed to analyze Florida law in the manner

required by the categorical approach and this Court's precedents. The government's request for deference in such circumstances confirms not only its discomfort with controlling Florida law but its aversion to the categorical approach.

C. The Government's Analysis of Other State Robbery Offenses Contravenes the Categorical Approach

The government's disregard of the categorical approach is more pronounced when it attempts to tie the issue here to other state robbery offenses. It advocates a *per se* rule that force necessary to overcome resistance always amounts to "*violent* force," claiming that any other rule would have excluded the simple robbery-by-force offense of 43 states at the time of the ACCA's enactment. Gov't Br. 8, 10, 18-20, 16a-27a. But that claim significantly misrepresents the actual legal landscape in 1986.

1. First, the government overstates the number of state non-aggravated robbery statutes for which overcoming resistance was the least culpable conduct. Although determining a statute's divisibility is the "first task" under the categorical approach, *Mathis*, 136 S. Ct. at 2256, the government ignores that task. It therefore overlooks that 3 states had *indivisible* robbery statutes for which fear of injury to *property* was the least culpable conduct, rendering those statutes categorically overbroad for a reason unrelated to overcoming resistance. App. A(1), *infra*. In addition, while the government claims that the robbery statutes of

only 3 states did not meet the elements clause due to the absence of an overcoming-resistance requirement (Gov't Br. 27a), there were actually 10 such states: in 6, robbery could be committed by any bodily impact or contact akin to the *Curtis Johnson* touching; and, in 4, robbery could be committed by snatching. App. A(2)-(3), *infra*. Thus, at the time of enactment, the robbery-by-force offenses in 13 states would have been overbroad for reasons having nothing to do with overcoming resistance. Moreover, at least 2 additional states (Kansas and Utah) included among the government's 43 did not recognize an overcoming-resistance element in their statutes or case law. And that brings the government's 43-state count down to 31 that could have possibly been impacted by the question presented here.

2. Even in that more limited universe of robbery offenses with an overcoming-resistance element, the government wrongly assumes that the minimum degree of force necessary to overcome resistance is identical in each state. But robbery laws are not monolithic. Indeed, the government at one point acknowledges that the minimum degree of force necessary to commit robbery is a product of the peculiarities of each state's law. Gov't Br. 32-33. Yet, in categorizing states in its Appendix B, the government does no more than engage in a simple word-matching game. It highlights the words "force" and "resistance" in each state's law, without scrutinizing how each state interprets those words. It therefore never ascertains the least culpable conduct in each state, as required by the categorical approach.

By prematurely terminating its inquiry after detecting the words "force" and "resistance," the government obscures whether other states are analogous to Florida in: 1) recognizing that any degree of resistance suffices; 2) recognizing that any degree of force can overcome resistance; and/or 3) applying those principles by prosecuting slight-force robbery cases. Some states may have neither similar principles nor applications, and in such states defendants will be hard pressed to show a "reasonable probability" the state would apply its robbery statute in an overbroad manner, as required by *Duenas-Alvarez*, 549 U.S. at 193. The government's superficial analysis ultimately provides the Court with no reliable information as to how many states other than Florida require only slight force to overcome slight resistance.

3. The government also understates the number of robbery offenses that would have satisfied the ACCA in 1986 for reasons unrelated to overcoming resistance. As an initial matter, the government refuses to even acknowledge the existence of the residual clause. It therefore ignores that virtually all robbery offenses—and even theft offenses requiring no resistance or touching—satisfied the expansive residual clause until this Court invalidated that clause in 2015. *See, e.g.*, Pet. Br. 3-4 (pickpocketing); *United States v. Welch*, 683 F.3d 1304, 1312-14 (11th Cir. 2012) (Florida robbery by snatching).

But even looking only at the elements clause, the government ignores that numerous *aggravated* robbery offenses would have easily met that clause in

1986 for reasons unrelated to overcoming resistance. Indeed, 29 states in 1986 had one or more aggravated robbery offenses that required the use, display, or representation of a weapon, conduct that indisputably involves the "use" or "threatened use" of "*violent* force." App. B, *infra*. Those easily-qualifying armed robbery offenses are precisely the type of offenses that predict future gun violence, and were repeatedly referenced in the lead-up to the 1986 amendment. *See* NACDL Amicus Br. 8-13.

Moreover, *if* the government is correct that a causation-of-injury element itself satisfies the elements clause (Gov't Br. 20), far more than the 5 non-aggravated robbery offenses it identifies (Gov't Br. 28a) would have qualified for that reason. As of 1986, 26 states had at least one aggravated robbery offense incorporating a causation-of-injury element. App. C, *infra*. And since 1986, even more states have added weapons-based and injury-based aggravated robbery offenses to their arsenal. App. D, *infra*.

4. Ignoring that many states have robbery offenses that, under its view, easily satisfy *Curtis Johnson*, the government asks the Court to craft a special rule for a subset of robbery statutes that require overcoming resistance. *See, e.g.*, Gov't Br. 8. But a *per se* rule automatically equating overcoming resistance with "*violent* force" is irreconcilable with the categorical approach. Federal courts must defer to each state's interpretation of the elements of its statute.

The government fails to offer any justification for the dramatic departure from practice and precedent its novel rule would require. It claims that applying *Curtis Johnson*'s "substantial degree of force" standard "is unlikely to achieve consistency in judicial decisionmaking." Gov't Br. 28. But it offers no support for that assertion. "Substantial" is an "adjective" this "Court has interpreted and applied innumerable times across a wide variety of contexts." *Dimaya*, 138 S. Ct. at 1240 & n.3 (Roberts, C.J., dissenting) (citing "a round dozen" of cases). And a "substantial" standard poses little difficulty where, as here, it is used to evaluate "real-world conduct." *Id.* at 1214-15 (quoting *Samuel Johnson*, 135 S. Ct. at 2561). The government has not identified any, let alone systemic, difficulties in applying *Curtis Johnson*. Nor has it offered any other reason why the Court should subordinate *Curtis Johnson*'s settled interpretation of the statutory text to unsupported concerns of administrability.

* * *

A straightforward application of *Curtis Johnson* compels the conclusion that Florida robbery is not a "violent felony." If Congress wants slight-force robberies to trigger the ACCA's severe 15-year mandatory-minimum penalty, it may amend the statute at any time. But absent such reform, the Court should not expand the elements clause beyond its text to compensate for the loss of the residual clause or to accommodate the government's policy preferences.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed and the case remanded.

Respectfully submitted,

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SEPTEMBER 4, 2018

APPENDIX

APPENDIX A

State Non-Aggravated Robbery Statutes With a Force Alternative at the Time of 18 U.S.C. § 924(e)(2)(B)(i)'s Enactment Which Did Not Meet the Elements Clause for Reasons Unrelated to Overcoming Resistance*

1. Robbery statutes that are indivisible as to force and fear, and fear of injury to property is the least culpable conduct

California: Cal. Penal Code § 211 (West 1970) (defining robbery as "accomplished by means of force or fear"); § 212 (defining "fear" as either "1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or, 2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery"); *United States v. Dixon*, 805 F.3d 1193, 1198 (9th Cir. 2015) (holding § 211 is indivisible regarding "force or fear")

Idaho: Idaho Code Ann. § 18-6501 (1979) (defining robbery as "accomplished by means of force or fear");

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* Unless indicated, there have been no material changes to the quoted language in the statutes listed in Appendices A, B, and C, between the date cited and today. Although a few of the statutes have been renumbered or recodified since the date cited, the relevant statutory language highlighted in these Appendices has remained the same. Appendices A, B, and C list statutes in effect at the time of 18 U.S.C. § 924(e)(2)(B)(i)'s enactment in 1986. Appendix D includes additional aggravated robbery statutes enacted after 1986.

§ 18-6502 (defining the "[f]ear which constitutes robbery" as "either: 1. the fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or, 2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery"); Idaho Criminal Jury Instructions. ICJI 501 ("Robbery") (Idaho Law Foundation, Inc. 1995) (stating that the sixth element of the offense is that the taking be "by the intentional use of force or fear to overcome the will of [name of victim]"); ICJI 502 ("Robbery – Fear Defined") (defining "fear" as "[the fear of an unlawful injury to the person or property of (name of victim)] [or] [the fear of an unlawful injury to the person or property]" of any relative, family member, or person in the company of the victim at the time)

Nevada: Nev. Rev. Stat. Ann. § 200.380 (Michie 1986) (defining robbery as an unlawful taking of property "by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery"); *United States v. Edling*, 895 F.3d 1153, 1156-57 (9th Cir. 2018) (holding that Nevada robbery "sweeps more broadly" than the elements clause because the "least of the acts criminalized" is "the taking of someone's personal property by instilling fear of injury to property," and the elements clause requires the use, attempted use, or threatened use of "physical force against *the person*")

2. Robbery statutes in which a robbery-by-force or robbery-by-assault may be committed by "any" bodily impact or contact

Arizona: Ariz. Rev. Stat. § 13-1902(A) (1978) (defining robbery as a taking of property from the person or presence of another, against his will, in which "such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property"); § 13-1901(1) (defining "force" to mean "*any* physical act directed against a person as a means of gaining control of property") (emphasis added)

Arkansas: Ark. Code § 41-2103(1) (1977) (defining robbery as "employ[ing] or threaten[ing] to immediately employ physical force upon another" during a theft or immediately thereafter); § 41-2101 (defining "physical force" to mean "*any* bodily impact, restraint, or confinement, or the threat thereof") (emphasis added); *United States v. Eason*, 829 F.3d 633, 641-42 (8th Cir. 2016) ("[W]e cannot conclude that the degree of force necessary to commit robbery in Arkansas rises to the level of physical force required to establish a crime of violence for ACCA purposes," since the legislature has defined "physical force" under Arkansas law as "any . . . [b]odily impact, restraint, or confinement"); *see also United States v. Pettis*, 888 F.3d 962, 964-65 (8th Cir. 2018) (noting that *Eason* held the Arkansas statutory definition requires only the "merest touch")

Iowa: Iowa Code Ann. § 711.1(1)(a) (West 1978) (defining robbery as "[c]ommit[ting] an assault upon

another" to assist or further an intended theft or escape therefrom); § 708.1 (defining "assault" to include "[a]ny act . . . which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act"); *State v. Spears*, 312 N.W.2d 79, 80-81 (Iowa Ct. App. 1981) (confirming that subsection (a) can be satisfied by a mere offensive touching); *United States v. Jones*, 2016 WL 41869269, at *4 (D. Minn. Aug. 8, 2016) (holding that Iowa robbery is not a "violent felony" because of § 708.1's definition of "assault")

Michigan: Mich. Comp. Laws Ann. § 750.530 (West 1968) (defining robbery as a taking of money or other property which may be the subject of larceny from the person or presence of another "by force and violence or by assault or putting in fear"); *People v. Terry*, 553 N.W.2d 23, 24-25 (Mich. Ct. App. 1993) (per curiam) (considering the meaning of "assault" and stating "it is clear that defendant spit on [the victim] to 'harm or embarrass him,' and, thus, his action constituted violence under the statute"); *People v. Boyd*, 300 N.W.2d 760, 762 (Mich. Ct. App. 1980) (per curiam) ("the throwing of liquid, alleged to be urine, into the face of another person constitutes the use of 'violence', thereby satisfying the requirements of the statute"); *People v. Tolliver*, 207 N.W.2d 458, 460 (Mich. Ct. App. 1973) (holding "force and violence, assault or putting in fear" are alternative means of violating a single indivisible element); *United States v. Ervin*, 198 F. Supp. 3d 1169, 1179-80 (D. Mont. July 28, 2016) (holding that Michigan's model jury instruction on robbery supports

finding of indivisibility because "it does not suggest the jury must unanimously agree on either force and violence, or assault, or putting in fear")

Ohio: Ohio Rev. Code Ann. § 2911.02(A) (Anderson Supp. 1985) (defining robbery as "[u]s[ing] or threaten[ing] the immediate use of force against another" in attempting or committing a theft offense or in fleeing immediately after the attempt or offense); § 2901(A) ("[f]orce means *any* violence, compulsion, or constraint physically exerted by *any* means upon or against a person or thing") (emphasis added); *United States v. Yates*, 866 F.3d 723, 727-32 (6th Cir. 2017) (holding that Ohio's third degree robbery offense by "force" is not a "crime of violence" under the Guidelines because of the "expansive" statutory definition of "force"); *Perez v. United States*, 885 F.3d 984, 989-90 (6th Cir. 2018) (confirming that *Yates* "turned on Ohio's broad definition of force" which does not satisfy *Curtis Johnson*)

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(v) (1983) (defining third degree robbery as "physically tak[ing] or remov[ing] property from the person of another by force however slight," in the course of committing a theft); *United States v. Peppers*, ___ F.3d ___, 2018 WL 3827213, at **14-16 (3d Cir. Aug. 13, 2018) (holding that since the "force however slight" language "has been interpreted to include 'any amount of force applied to a person while committing a theft[,]'" and "'[t]he degree of actual force is immaterial, so long as it is sufficient to separate the victim from his property,' [*Commonwealth v.*] *Brown*, 484 A.2d

[738,] 741 [(Pa. 1984)], Pennsylvania's robbery statute suffers from the same issues the Supreme Court identified with Florida's battery statute in *Johnson 2010*. Both laws proscribe *the merest touching*, which is insufficient conduct to meet the 'physical force' requirement under the ACCA's elements clause") (emphasis added)

3. Robbery statutes that can be satisfied by snatching (without touching, using no more force than necessary to take the item)

District of Columbia: D.C. Code § 22-281 (1981) (defining robbery as a taking "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear"); *United States v. Sheffield*, 832 F.3d 296, 314-15 (D.C. Cir. 2016) (citing "stealthy seizure" clause as confirmation that "D.C.'s robbery statute includes offenses that fail to qualify as crimes of violence under section 4B1.2")

Georgia. Ga. Code Ann. § 16-8-40(a) (Michie 1984) (defining robbery as a taking of property from another with intent to commit theft, "(1) By use of force; (2) By intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or (3) By sudden snatching"); *United States v. Fluker*, 891 F.3d 541, 549 & n.3 (4th Cir. 2018) (recognizing that Georgia's robbery statute is indivisible and can be committed by snatching, which does not require any more

force than is necessary to remove an item from the victim's grasp)

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(B)-(C) (West 1983) (defining robbery under § 651(1)(C) as "us[ing] physical force on another with the intent" to "prevent or overcome resistance" or "compel the person in control of the property to give it up," during a theft or attempt to commit a theft); *Raymond v. State*, 467 A.2d 161, 163-65 (Me. 1983) ("By clear and plain meaning of the words of section 651, the Maine legislature has dictated that the mere act of snatching a purse from the hand of a victim is a sufficient act of physical force for robbery"; all that is necessary is sufficient force to produce victim "awareness"; the drafters of the Maine Criminal Code "made a conscious decision that *any* physical force" with intent to "compel the person in control of the property to give it up," suffices "to raise a theft offense to the level of robbery"); *United States v. Rembert*, 658 A.2d 656, 657-58 (Me. 1995) (explaining that the term "physical force" in § 651 simply requires "offensive physical contact"); *United States v. Mulkern*, 854 F.3d 87, 92-94 (1st Cir. 2017) (holding that "[t]he word 'any'" used by the Maine Supreme Court in *Raymond* "is a powerful beacon to us here," making clear that § 651(C) does not require a showing of the *Curtis Johnson* level of force; "something short of that will do"; the divisible offense under §651(1)(B)(1) for "threaten[ing] to use force" likewise does not meet the ACCA's elements clause since it requires the same amount of force)

Massachusetts: Mass. Gen. Laws ch. 265, § 19(b) (1985) (defining robbery as the taking of money or property from the person of another, or from his immediate control, "by force and violence, or by assault and putting in fear"); *Commonwealth v. Jones*, 283 N.E.2d 840, 844-45 (Mass. 1972) ("[S]o long as the victim is aware of the application of force which relieves him of his property . . . , the requisite degree of force is present to make the crime robbery"; there need not be resistance by the victim); *United States v. Starks*, 861 F.3d 306, 317-19 (1st Cir. 2017) (accepting the government's concession that the statute is indivisible, and holding Massachusetts robbery is "categorically not a violent felony" since the minimum conduct is snatching)

APPENDIX B

State Aggravated Robbery or Enhancement Statutes at the Time of 18 U.S.C. § 924(e)(2)(B)(i)'s Enactment Which Required the Use, Attempted Use, Display, Threat, or Representation of a Weapon

Alaska: Alaska Stat. § 11.41.500(a)(2) (1980) (using or attempting to use a dangerous instrument or representing that the defendant or another participant is armed with such an instrument)

Arizona: Ariz. Rev. Stat. Ann. § 13-1904(A)(2) (1978) (using or threatening to use a deadly weapon or dangerous instrument)

Arkansas: Ark. Stat. § 41-2102(1)(a) (1977) (representing that one is armed with a deadly weapon)

Colorado: Colo. Rev. Stat § 18-4-302(1)(b) (1986) (using a deadly weapon to put a person in reasonable fear of death or bodily injury)

Connecticut: Conn. Gen. Stat. Ann. § 53a-134(a)(3) (West Supp. 1985) (using or threatening the use of a dangerous instrument); § 53a-134(a)(4) (displaying or threatening the use of a firearm)

Delaware: Del. Code Ann. tit. 11, § 832(a)(2) (1979) (displaying what appears to be a deadly weapon); § 832(a)(3) (using or threatening the use of a dangerous instrument)

Georgia: Ga. Code. Ann. § 16-8-41(a) (1984) (using an offensive weapon, or any replica, article, or device having the appearance of such weapon)

Idaho: Idaho Code § 19-2520 (Supp. 1985) (displaying, using, threatening, or attempting to use a firearm or other deadly weapon while committing a robbery)

Kentucky: Ky. Rev. Stat. Ann. § 515.020(1)(c) (Michie 1985) (using or threatening the immediate use of a dangerous instrument upon any person who is not a participant in the crime)

Louisiana: La. Rev. Stat. Ann. § 14:64.1(A) (1986) (leading a victim to reasonably believe one is armed with a dangerous weapon)

Maryland: Md. Code Ann. § 488 (Michie 1982) (robbing with a dangerous or deadly weapon); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016) (Maryland armed robbery under § 488 requires the use of a dangerous or deadly weapon)

Michigan: Mich. Comp. Laws § 750.529 (West 1968) (assaulting and robbing while being armed with an article used or fashioned in a manner to lead the victim to reasonably believe the article is a dangerous weapon)

Mississippi: Miss. Code Ann. § 97-3-79 (1972) (exhibiting a deadly weapon)

Missouri: Mo. Rev. Stat. § 569.020(1)(3) (1979) (using or threatening the immediate use of a dangerous instrument against any person); § 569.020(1)(4)

(displaying or threatening to use what appears to be a deadly weapon or dangerous instrument)

New Hampshire: N.H. Rev. Stat. Ann. § 636:1(III)(b) (1986) (reasonably appearing to be armed with a deadly weapon)

New York: N.Y. Penal Law § 160.10(2)(b) (McKinney 1975) (displaying what appears to be a firearm); § 160.15(3) (using or threatening the immediate use of a dangerous instrument); § 160.15(4) (displaying what appears to be a firearm)

North Carolina: N.C. Gen. Stat. § 14-87(a) (1986 Supp.) (possessing, using, or threatening to use any firearm or other dangerous weapon); *State v. Gaither*, 587 S.E.2d 505, 508 (N.C. Ct. App. 2003) (holding that the firearm must be used or threatened to be used; mere possession is insufficient)

North Dakota: N.D. Cent. Code § 12.1-22.01(2) (1985) (firing a firearm, exploding or hurling a destructive device, or directing the force of any other dangerous weapon against another)

Oklahoma: Okla. Stat. tit. 21, § 801 (West 1982) (using a firearm, dangerous weapon, or imitation firearm that would lead a victim to believe it is a real firearm)

Oregon: Or. Rev. Stat. § 164.405(1)(a) (1985) (representing that one is armed with a dangerous or deadly weapon); § 165.415(1)(b) (using or attempting to use a dangerous weapon)

Rhode Island: R.I. Gen. Laws § 11-39-1 (1981) (using a dangerous weapon)

Tennessee: Tenn. Code Ann. § 39-2-501 (1982) (using a deadly weapon) (repealed 1989)

Texas: Tex. Penal Code § 29.03(a)(2) (West 1974) (using or exhibiting a deadly weapon)

Utah: Utah Code Ann. § 76-6-302(1)(a) (1975) (using a firearm, knife, or deadly weapon); § 76-6-302(1)(a) (1989) (amending provision to require using or threatening to use a dangerous weapon)

Virginia: Va. Code Ann. § 18.2-53.1 (1982) (using or displaying a firearm in committing a felony)

Washington: Wash. Rev. Code § 9A.56.200(1)(b) (1985) (displaying what appears to be a firearm or other deadly weapon)

West Virginia: W. Va. Code Ann. § 61-2-12 (Michie 1984) (threatening or presenting firearms or other deadly weapons, or using a dangerous weapon or device)

Wisconsin: Wis. Stat. Ann. § 943.32(2) (West 1982) (using or threatening to use a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon)

Wyoming: Wyo. Stat. § 6-2-401(c)(ii) (1983) (using or exhibiting a deadly weapon or simulated deadly weapon)

APPENDIX C

State Aggravated Robbery or Enhancement Statutes at the Time of 18 U.S.C. § 924(e)(2)(B)(i)'s Enactment Which Required Threatening, Inflicting, or Putting in Fear of Bodily Injury

Alabama: Ala. Code § 13A-8-41(a)(2) (Michie 1982) (causing serious physical injury)

Alaska: Alaska Stat. § 11.41.500(a)(3) (1980) (causing or attempting to cause serious physical injury)

Arkansas: Ark. Stat. § 41-2102(1)(b) (1977) (inflicting or attempting to inflict death or serious physical injury)

Connecticut: Conn. Gen. Stat. Ann. § 53a-134(a)(1) (West 1985) (causing serious physical injury)

Delaware: Del. Code Ann. tit. 11, § 832(a)(1) (1979) (causing physical injury)

Hawaii: Haw. Rev. Stat. § 708-840(1)(a) (1985) (attempting to kill, or inflicting or attempting to inflict serious bodily injury)

Indiana: Ind. Code § 35-42-5-1 (1986) (causing bodily injury is a Class B felony; causing serious bodily injury is a Class A felony)

Kansas: Kan. Stat. Ann. § 21-3427 (1981) (inflicting bodily harm)

Kentucky: Ky. Rev. Stat. Ann. § 515.020(1)(a) (Michie 1985) (causing physical injury)

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(D) (West 1983) (inflicting or attempting to inflict bodily injury)

Michigan: Mich. Comp. Laws § 750.529 (West 1968) (inflicting serious injury)

Minnesota: Minn. Stat. § 609.245 (1986) (inflicting bodily harm)

Missouri: Mo. Rev. Stat. § 569.020(1)(1) (1979) (causing serious physical injury)

New Hampshire: N.H. Rev. Stat. Ann. § 636:1(III)(c) (1986) (inflicting or attempting to inflict death or serious injury)

New Jersey: N.J. Stat. Ann. § 2C:15-1(b) (West 1982) (attempting to kill, or inflicting or attempting to inflict serious bodily injury)

New York: N.Y. Penal Code § 160.10(2)(a) (McKinney 1975) (causing physical injury); § 160.15(1) (causing serious physical injury)

North Dakota: N.D. Cent. Code § 12.1-22-01(2) (1985) (menacing another with serious bodily injury or inflicts bodily injury)

Ohio: Ohio Rev. Code Ann. § 2911.01(A)(2) (Anderson Supp. 1985) (inflicting or attempting to inflict serious physical harm)

Oregon: Or. Rev. Stat. § 165.415(1)(c) (1985) (causing or attempting to cause serious physical injury)

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(i) (1983) (inflicting serious bodily injury); § 3701(a)(1)(ii) (threatening or putting another in fear of immediate serious bodily injury); § 3701(a)(1)(iv) (inflicting bodily injury, or threatening or putting another in fear of immediate bodily injury)

Texas: Tex. Penal Code Ann. § 29.03(a)(1) (1974) (causing serious bodily injury to another)

Utah: Utah Code Ann. § 76-6-302(1)(b) (1978) (causing serious bodily injury)

Vermont: Vt. Stat. Ann. tit. 13, § 608(c) (1974) (causing bodily injury)

Washington: Wash. Rev. Code § 9A.56.200(1)(c) (1985) (inflicting bodily injury)

West Virginia: W. Va. Code Ann. § 61-2-12 (Michie 1984) (committing partial strangulation, suffocation, striking, beating, or "other violence")

Wyoming: Wyo. Stat. § 6-2-401(c)(i) (1983) (inflicting or attempting to inflict serious bodily injury)

APPENDIX D

State Aggravated Robbery or Enhancement Statutes Promulgated After 18 U.S.C. § 924(e)(2)(B)(i)'s Enactment Which Contain Either a Use/Threat of a Weapon, or Bodily Injury Element

California: Cal. Penal Code § 12022.53 (West 2010) (providing additional term of imprisonment for use of a firearm during certain felonies, including robbery); Cal. Penal Code § 12022.7 (2010) (providing additional term of imprisonment for inflicting great bodily injury during a felony or attempted felony, unless infliction of great bodily injury is an element of the offense)

Delaware: Del. Code Ann. tit. 11, § 832(a)(5) (West 2016) (threatening death upon another)

Illinois: 720 Ill. Comp. Stat. 5/18-2(a)(3) (West 2000) (discharging a firearm); para. 18-2(a)(4) (discharging a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person); 720 Ill. Comp. Stat. 5/18-1(b)(1) (West 2013) (indicating one is armed with a firearm or other dangerous weapon)

Louisiana: La. Stat. Ann. § 14:64.3 (1999) (providing an enhancement if a dangerous weapon is used during a robbery); § 14:64.4(A)(1) (2001) (inflicting serious bodily injury)

Maryland: Md. Code Ann., Crim. Law § 3-403 (West 2005) (displaying a written instrument claiming

that the person is in possession of a dangerous weapon)

Michigan: Mich. Comp. Laws § 750.529 (West 2004) (representing possession of a weapon)

Minnesota: Minn. Stat. Ann. § 609.245(2) (West 1994) (implying possession of a dangerous weapon)

Nebraska: Neb. Rev. Stat. § 28-1205(1)(a), (3) (2009) (designating using a firearm or other deadly weapon to commit a felony as a separate offense requiring a consecutive sentence)

Ohio: Ohio Rev. Code Ann. § 2911.01(A)(1) (West 1996) (using a deadly weapon or displaying, brandishing, or indicating one possesses a deadly weapon)

Oklahoma: Okla. Stat. Ann. tit. 21, § 797(1) (West 2001) (inflicting serious bodily injury); § 797(2) (threatening immediate serious bodily injury); § 797(3) (putting a person in fear of immediate serious bodily injury)

Rhode Island: R.I. Gen. Laws Ann. § 11-39-1 (1991) (using a dangerous weapon or injuring a victim)

South Dakota: S.D. Codified Laws § 22-30-6 (2005) (using a dangerous weapon); § 22-30-6 (2007) (adding using a physical object simulating a dangerous weapon)

Tennessee: Tenn. Code Ann. § 39-13-402(a)(1) (1989) (accomplishing with a deadly weapon, or displaying an article used or fashioned to lead the victim to reasonably believe it is a deadly weapon);

§ 39-13-402(a)(2) (causing serious bodily injury); § 39-13-403(a) (accomplishing with a deadly weapon and causing serious bodily injury)

Texas: Tex. Penal Code Ann. § 29.03(a)(3) (West 1989) (causing bodily injury, or threatening or placing another in fear of imminent bodily injury, if the victim is 65 years or older or disabled)

West Virginia: W. Va. Code Ann. § 61-2-12(b) (West 2000) (placing a victim in fear of bodily injury)

NO: 17-5554

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

CASES:

Benitez-Saldana v. State,

67 So.3d 320 (Fla. 2nd DCA 2011) 3

Hardy v. United States,

Slip op. (11th Cir. Aug. 11, 2017) 4

Hayes v. State,

780 So.2d 918 (Fla. 1st DCA 2001) 3

In re Boggess,

205 WL 3344502 (Ohio Ct. App. 2005) 2

Johnson v. State,

612 So.2d 689 (Fla. 1st DCA 1991) 3

Johnson v. United States,

559 U.S. 133 (2010) 1, 3

Moncrieffe v. Holder,

133 S.Ct. 1678 (2013) 3

Sanders v. State,

769 So. 2d 506 (Fla. 5th DCA 2000) 3

State v. Carter,

29 Ohio App.3d 148, 504 N.E.2d 469 (1985) 1-2

State v. Grant,

1981 WL 4576 (Ohio Ct. App. Oct. 22, 1981) 2-3

State v. Juhasz,

2015 WL 5515826 (Ohio Ct. App. 2015) 2

United States v. Fritts,

841 F.3d 937 (11th Cir. 2016),

cert. denied, 2017 WL 554569 (June 19, 2017) 4

United States v. Gardner,

823 F.3d 793 (4th Cir. 2016) 1

United States v. Yates,

___ F.3d ___, 2017 WL 342084 (6th Cir. Aug. 9, 2017) 1-3

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.1(8), Petitioner Denard Stokeling wishes to alert the Court to the Sixth Circuit Court of Appeals' recent decision in *United States v. Yates*, ___ F.3d ___, 2017 WL 342084 (6th Cir. Aug. 9, 2017), issued after the petition for writ of certiorari was filed in this case. In *Yates*, the Sixth Circuit expressly aligned itself with the Fourth Circuit in holding that an Ohio statutory robbery conviction did not qualify as an ACCA violent felony, in light of Ohio appellate decisions confirming that a robbery by "use of force" under the statute can be accomplished by the minimal amount of force necessary to snatch a purse involuntarily from an individual, or simply "bumping into an individual." 2017 WL 3402084 at *6 (noting accord with the Fourth Circuit in *United States v. Gardner*, 823 F.3d 793, 803-804 (4th Cir. 2016), where that court recognized that under North Carolina law "even minimal contact may be sufficient to sustain a robbery conviction if the victim forfeits his or her property in response.")

Like the Fourth Circuit in *Gardner*, but unlike the Eleventh Circuit in the case below, the Sixth Circuit in *Yates* meticulously reviewed Ohio appellate caselaw in order to determine whether an Ohio robbery offense qualified as an ACCA violent felony. And in doing so, the Sixth Circuit found significant that several Ohio appellate courts had affirmed robbery convictions where the force applied by the defendant was demonstrably "lower than the type of violent force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at *4. For instance, the Sixth Circuit noted, in *State v. Carter*, 29 Ohio App.3d 148, 504 N.E.2d 469 (1985), a purse snatching

case, an Ohio court had affirmed a robbery conviction where the victim simply had a firm grasp of her purse, the defendant pulled it from her, and then pulled her right hand off her left hand where she was holding the bottom of the purse. *Id.* at 470-471(explaining that this simple incident involved the requisite degree of actual force, "*however miniscule*" to constitute a robbery; citing as support *State v. Grant*, 1981 WL 4576 at *2 (Ohio Ct. App. Oct. 22, 1981), which had held that a mere "bump is an act of violence" within the meaning of the robbery statute, "even though only mildly violent, as the statute does not require a high degree of violence").

In *In re Boggess*, 205 WL 3344502 (Ohio Ct. App. 2005), the Sixth Circuit noted that an appellate court had clarified that the "force" requirement in the Ohio robbery statute would be satisfied so long as the offender "physically exerted force upon the victim's arm so as to remove the purse from her *involuntarily*." *Id.* at *3 (emphasis added). In *Boggess*, the defendant simply grabbed the victim's purse, then jerked her arm back, and kept running." *Id.* at *1.

And in *State v. Juhasz*, 2015 WL 5515826 (Ohio Ct. App. 2015), the Sixth Circuit finally noted, an Ohio court had expressly confirmed that so long as there was "a *struggle* over control of an individual's purse" in any degree, that would be sufficient to establish the "element of force" in the statute. The "struggle need not be prolonged or active; the act of forcibly removing a purse from an individual's shoulder is sufficient." *Id.* at *2. While the *Juhasz* court did not specifically discuss the common law roots of the "struggle" concept in the Ohio robbery caselaw, as

discussed in Mr. Stokeling's petition for certiorari at 16, that is a concept that derives directly from the common law.

In light of the above decisions, the Sixth Circuit found a "realistic probability" that Ohio applied its robbery statute "in such a way that criminalizes a level of force lower than the type of force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at * 5 (citing *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013)). And notably, that can be said about Florida as well, given the robbery cases cited in Mr. Stokeling's petition at 24-25 – specifically, *Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993); *Sanders v. State*, 769 So. 2d 506, 507-508 (Fla. 5th DCA 2000); *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001); and *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011) – continually ignored by the Eleventh Circuit.

Had the Sixth Circuit heard Mr. Stokeling's case, and carefully considered the above Florida caselaw in the same manner that it considered Ohio caselaw in *Yates*, it would have found that a Florida robbery as well may be committed by using only a *de minimis* degree force, and therefore does not categorically require the use of violent "physical force" as required by *Curtis Johnson*. The "bump" in *Hayes* is indistinguishable from the "bump" in *Grant*.

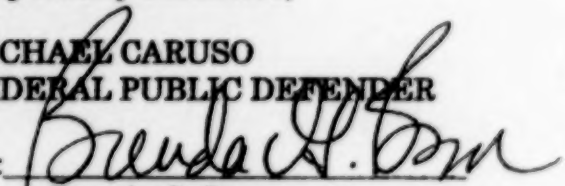
As such, *Yates* confirms that the circuit conflict has widened since the filing of Mr. Stokeling's petition for writ of certiorari. For the reasons stated in the petition at 27-28, that conflict is prejudicing Tenth and Eleventh Circuit defendants and should be resolved in this case. And finally, if there were any doubt at the time Mr. Stokeling filed his petition as to whether the Eleventh Circuit might ever

reconsider *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *cert. denied*, 2017 WL 554569 (June 19, 2017), there can be no such doubt after the recent decision in *Bobby Jo Hardy v. United States*, Slip op. (11th Cir. Aug. 11, 2017), granting the government's motion for "summary affirmance" based upon *Fritts*, and relieving the government from even having to file a responsive brief in an appeal challenging an ACCA enhancement predicated upon a Florida robbery. *See Hardy*, Slip op. at 3 (finding summary affirmance based upon *Fritts* "appropriate because the government is clearly right as a matter of law, and no substantial question exists as to the outcome of the case;" defendant's "convictions categorically qualify as 'violent felonies' under the ACCA based on *Fritts*, and any doubt about that conclusion was put to rest when the Supreme Court denied certiorari in that case").

Hardy confirms that the Eleventh Circuit will not – on its own – ever reconsider whether a Florida robbery offense categorically requires the *Curtis Johnson* level of *violent* force. Without this Court's intervention, Eleventh Circuit defendants will continue to be sentenced harshly and unfairly, unlike their similarly-situated cohorts in the Fourth and Sixth Circuits.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 

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August 29, 2017

No: 17-5554

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this 29th day of August, 2017, in accordance with SUP. CT. R. 29, eleven (11) copies of the Supplemental Brief for the Petitioner, and Certificate of Service were served by Federal Express upon Jeffrey B. Wall, Acting Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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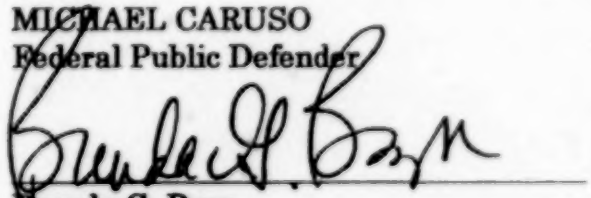
Federal Public Defender

Fort Lauderdale, Florida
August 29, 2017

By: 

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

CASES:

Benitez-Saldana v. State,

67 So.3d 320 (Fla. 2nd DCA 2011) 2

Robinson v. State,

692 So.2d 883 (Fla. 1997) 1

Montsdoca v. State,

84 Fla. 82, 93 So. 157, 159 (Fla. 1922) 3

Johnson v. United States,

559 U.S. 133 (2010) 2

United States v. Fritts,

841 F.3d 937 (11th Cir. 2016),

cert. denied, 2017 WL 554569 (June 19, 2017) 2-3

United States v. Geozos,

___ F.3d___, 2017 WL 3712155 (9th Cir. Aug. 29, 2017) 1-3

United States v. Lockley,

632 F.3d 1238 (11th Cir. 2011) 2

STATUTORY AND OTHER AUTHORITY:

Supreme Court Rule 15.8 1

Fla. Stat. § 812.13 1

Fla. Stat. § 812.13(1) 1

SECOND SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioner Denard Stokeling wishes to alert the Court to the Ninth Circuit Court of Appeals' recent decision in *United States v. Geozos*, ___ F.3d ___, 2017 WL 3712155 (9th Cir. Aug. 29, 2017) which directly conflicts with the Eleventh Circuit's decision in his case. In *Geozos*, the Ninth Circuit considered a robbery conviction under the *exact* statute here at issue, Fla. Stat. § 812.13(1), and held that a Florida robbery conviction did not categorically qualify as an ACCA violent felony since § 812.13(1) – both by its text, and as interpreted by the Florida courts – did *not* require the use of "violent force." *Id.* at *7.

As to the text of § 812.13(1), the Ninth Circuit found significant that the terms "force" and "violence" were used separately, which suggested "that not all 'force' that is covered by the statute is 'violent force.'" *Id.* That, in and of itself, led the Ninth Circuit to "doubt whether a conviction for violating section 812.13 qualifies as a conviction for a 'violent felony." *Id.* But ultimately, it was Florida caselaw that made it "clear" to the Ninth Circuit that "one can violate section 812.13 without using violent force." *Id.* The Ninth Circuit acknowledged that according to *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), a conviction under Fla. Stat. § 812.13(1) requires that there "be resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886. However, the Ninth Circuit pointed out, Florida caselaw both prior and subsequent to *Robinson* confirmed that "the amount of resistance can be minimal." *Id.*

For instance, the Ninth Circuit noted with significance, in *Mims v. State*, 342 So.2d 883, 886 (Fla. 3rd DCA 1997), a Florida appellate court had held that "Although purse snatching is not robbery if no more force or violence is used than necessary to physically remove the property from a person who does not resist, if the victim does resist *in any degree* and this resistance is overcome by the force of the perpetrator, the crime of robbery is complete." *Geozos*, 2017 WL 3712155 at *7 & n. 9 (adding the emphasis to the words "*in any degree*" in *Mims* and noting that *Mims* was "cited with approval in *Robinson*").

After *Robinson*, the Ninth Circuit also found significant, in *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) – a case Mr. Stokeling specifically cited to the Eleventh Circuit and to this Court – another Florida appellate court had held that a robbery conviction "may be based on a defendant's act of engaging in a tug-of-war over the victim's purse." And in the Ninth Circuit's view, such an act "does not involve the use of violent force within the meaning of the ACCA;" rather, it involves "something less than violent force within the meaning of *Johnson I*." *Geozos*, 2017 WL 3712155 at *7 (citing *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017)).

The Ninth Circuit acknowledged that its conclusion that a Florida robbery offense was not categorically an ACCA "violent felony" put it "at odds" with the Eleventh Circuit, which held just the opposite in *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), and *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) (following *Lockley*). However, the Ninth Circuit rightly found *Lockley* and

Fritts unpersuasive since they overlooked the crucial point – confirmed by Florida caselaw – that violent force was unnecessary to overcome resistance. It explained:

> [W]e think the Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force. *See Montsdoca v. State*, 84 Fla. 82, 93 So. 157, 159 (Fla. 1922) ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.")

Geozos, 2017 WL 3712155 at *8.

In light of the Ninth Circuit's well-founded criticism of the Eleventh Circuit in *Geozos* and indeed, its acceptance of the very arguments articulated by Mr. Stokeling to the Eleventh Circuit, it is clear that Mr. Stokeling would have had his non-ACCA sentence upheld had his case been heard by the Ninth Circuit. And plainly, going forward, scores of identically-situated Ninth and Eleventh Circuit defendants with identical prior convictions will be sentenced disparately unless this Court intervenes. The circuit conflict is unquestionably direct at this point, the issue is ripe for resolution, there is no valid reason to delay its resolution, and the instant case presents an ideal vehicle for its resolution. By granting certiorari in this case, the Court will not only be able to resolve the direct conflict that now exists between the Ninth and Eleventh Circuits on whether Florida robbery convictions qualify as ACCA violent felonies, but also the broader circuit conflict on whether robbery offenses that include the common law "overcoming resistance" element categorically require the use of violent force.

As such, the Court should grant Mr. Stokeling's petition and definitively resolve this important and recurring elements clause issue that now squarely divides the circuits, and is unfairly prejudicing many identically-situated defendants. Notably, the precise issue raised herein is also before the Court in a second case, *Kenneth Roy Conde v. United States*, No. 17-5772 (pet. for cert. filed Aug. 24, 2017, government's response due Sept. 28, 2017). *Conde*, like Mr. Stokeling's case, comes to the Court on direct review, squarely tees up the question presented, and involves no side issues or potential obstacles to review. Either one of these cases would present an ideal vehicle to resolve the question presented. Accordingly, if the Court chooses to resolve it in *Conde*, Mr. Stokeling's case should be held pending resolution of that case.

Respectfully submitted,

MICHAEL CARUSO
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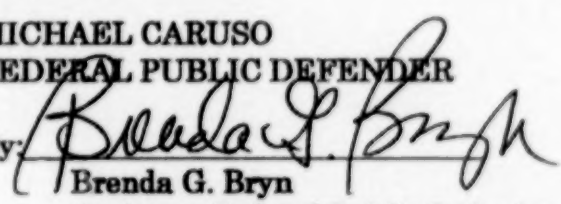
By: 

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this 31st day of August, 2017, in accordance with SUP. CT. R. 29, eleven (11) copies of the Second Supplemental Brief for the Petitioner, and Certificate of Service were served by Federal Express upon Jeffrey B. Wall, Acting Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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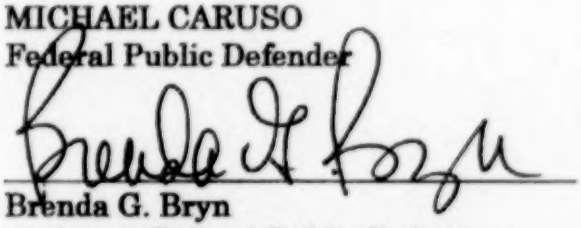
By: 

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NO: 17-5554

IN THE
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OCTOBER TERM, 2017

DENARD STOKELING,

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UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
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THIRD SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

CASES:

Boykin v. United States,

2018 WL 705523 (N.D. Ala. 2018) 2

Childs v. United States,

2017 WL 4538923 (N.D. Ala. 2017) 2

Dunn v. United States,

2017 WL 4472714 (N.D. Ala. 2017) 2

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Jackson v. State,

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Sanders v. State,

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Senter v. United States,

2018 WL 705526 (N.D. Ala. 2018) 2

United States v. Castleman,

___ U.S. ___, 134 S.Ct. 1405 (2014) 4

United States v. Freeman,

2016 WL 4394172 (S.D. Ala. 2016) 2

United States v. Fritts,

841 F.3d 937 (11th Cir. 2016) 2

United States v. Geozos,

870 F.3d 890 (9th Cir. 2017) 3

United States v. Gilbert,

___ Fed. Appx. ___, 2017 WL 6728518 (11th Cir. Dec. 29, 2017) 2

United States v. Jones,

877 F.3d 884 (9th Cir. 2017) 3

United States v. Lee,

701 Fed. Appx. 697 (10th Cir. 2017) 3

United States v. Lockley,

632 F.3d 1238 (11th Cir. 2011) 2

United States v. Molinar,

876 F.3d 953, 2017 WL 5760565 (9th Cir. Nov. 29, 2017),

amended and superseded on denial of reh'g en banc,

___ F.3d ___, 2017 WL 7362022 (9th Cir. Feb. 5, 2018) 3

United States v. Rice,

2017 WL 1247402 (N.D. Ala. 2017) 2

United States v. Walton,

881 F.3d 768 (9th Cir. Feb. 1, 2018) 1-4

Wright v. State,

487 So.2d 962 (Ala. Crim. App. 1985) 1, 3

Wright v. State,

432 So.2d 510 (Ala. Crim. App. 1983) 1, 3

STATUTORY AND OTHER AUTHORITY:

Supreme Court Rule 15.8 1

Ariz. Rev. Stat. § 1904 3

THIRD SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioner Denard Stokeling wishes to alert the Court to the Ninth Circuit Court of Appeals' recent decision in *United States v. Walton*, 881 F.3d 768 (9th Cir. Feb. 1, 2018), holding that a conviction for Alabama first-degree robbery is not categorically a violent felony within the ACCA's elements clause. *Walton* is significant to this case for several reasons.

Alabama first-degree robbery is the enhanced (armed) version of Alabama third-degree robbery. Like the Florida unarmed robbery offense at issue in Petitioner's case, the Alabama third-degree robbery offense requires a taking of property by "force" sufficient to overcome the victim's resistance. And notably, *Walton* has made clear that the Alabama courts have interpreted the "overcoming resistance" element of their robbery statute just as the Florida courts interpret the "overcoming resistance" element in the Florida robbery statute: namely, to require only minimal, non-violent force, consistent with the rule at common law. *See Walton*, 881 F.3d at 773-774 (noting with significance that Alabama courts have affirmed robbery convictions where the "force" used to overcome resistance was "non-violent under *Johnson I*" such as where the defendant merely tugged a purse and yanked it off the victim's arm, *Jackson v. State*, 969 So.2d 930 (Ala. Crim. App. 2007); pushed a cashier out of the way to take money from a cash register, *Wright v. State*, 487 So.2d 962, 964 (Ala. Crim. App. 1985); or shoved the victim into a corner to effect an escape, *Wright v. State*, 432 So.2d 510, 512 (Ala. Crim. App. 1983)).

The Eleventh Circuit has recognized that the elements of Florida and Alabama robbery are the same; under both statutes "the degree of force required –

force sufficient to overcome the victim's resistance – is defined in a similar way;" and it is therefore "arguable" that the "same reasoning" applied in *United States v. Fritts*, 841 F.3d 937, 940-42 (11th Cir. 2016) and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) would apply to Alabama robbery. *United States v. Gilbert*, ___ Fed. Appx. ___, 2017 WL 6728518 at **5-6 (11th Cir. Dec. 29, 2017). Moreover, district courts within the Eleventh Circuit have consistently held that because the Alabama robbery offense "is substantially similar to the Florida robbery statute," *Fritts* and *Lockley* require a finding that Alabama robbery likewise meets the elements clause. *See Senter v. United States*, 2018 WL 705526 at *2-3 (N.D. Ala. 2018); *Boykin v. United States*, 2018 WL 705523 (N.D. Ala. 2018); *Childs v. United States*, 2017 WL 4538923 (N.D. Ala. 2017); *Dunn v. United States*, 2017 WL 4472714 (N.D. Ala. 2017); *United States v. Rice*, 2017 WL 1247402 (N.D. Ala. 2017); *United States v. Freeman*, 2016 WL 4394172 (S.D. Ala. 2016).

Given that Eleventh Circuit courts treat these analogous robbery offenses as categorically violent, and Ninth Circuit courts do not, *Walton* not only confirms that resolution of the circuit conflict as to whether Florida robbery is a violent felony will have broad legal importance; it specifically disproves the government's claim that the issue raised by Petitioner "is unlikely to recur with great frequency *in the Ninth Circuit*, which sits on the other side of the country." BIO at 18 (emphasis added).

With the decision in *Walton*, the Ninth Circuit has considered three times in less than a year whether the degree of force necessary to overcome victim resistance in a state robbery offense is categorically "violent force" as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). As Petitioner noted in his Reply

to the BIO, after holding in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) that Florida robbery was not a violent felony because Florida caselaw confirms overcoming resistance does not require violent force, the Ninth Circuit analyzed the Arizona robbery statute similarly, and held that a conviction under that statute was not a violent felony since the Arizona courts interpret their "overcoming resistance" element to require only minimal, non-violent force. *See* Reply to BIO at 9-10, n. 7 (citing *United States v. Molinar*, 876 F.3d 953, 2017 WL 5760565 at *4 (9th Cir. Nov. 29, 2017)[1] and *United States v. Jones*, 877 F.3d 884, 888-889 (9th Cir. 2017)).

The Ninth Circuit in *Walton* expressly followed *Molinar* in holding that Alabama robbery did not categorically qualify as an ACCA violent felony. Although *Walton* did not specifically mention *Geozos*, the reasoning in *Walton* and *Molinar* is consistent with *Geozos*. Moreover, the Ninth Circuit also found *United States v. Lee*, 701 Fed. Appx. 697, 701 (10th Cir. 2017) (holding that Florida's resisting with violence offense is not a violent felony since it can be committed by simply "wiggling and struggling" and "scuffling") particularly relevant to its analysis of whether an Alabama robbery conviction qualified as an ACCA violent felony. For indeed, it noted, the "shoving" conduct in the two Alabama *Wright* cases was "no more violent than these minor scuffles" in the Florida resisting context. Therefore, the Ninth Circuit concluded, the "force" required to support an Alabama robbery conviction

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[1] In *United States v. Molinar*, ___ F.3d ___, 2017 WL 7362022 at **4-5 (9th Cir. Feb. 5, 2018), the Ninth Circuit amended the panel decision cited in the Reply to the BIO at 9, n. 7 and in *Walton*, but reaffirmed that Ariz. Rev. Stat. § 1904 did not meet the Career Offender elements clause because Arizona courts had not required the "overpowering force" element "to be violent in the sense discussed by the Supreme Court in *Johnson*."

was "not sufficiently violent to render that crime a violent felony under the ACCA." *Walton*, 881 F.3d at 774.

The Ninth Circuit ultimately went beyond its decisions in *Geozos* and *Molinar* by clarifying in *Walton* that "[t]he mere potential for some trivial pain or slight injury will not suffice" for the ACCA elements clause, since "'violent' force must be 'substantial' and 'strong.'" *Walton*, 881 F.3d at 773 (citing *Curtis Johnson* and *United States v. Castleman*, ___ U.S. ___, 134 S.Ct. 1405 (2014)). And notably, in so holding, the Ninth Circuit adopted arguments articulated by Petitioner in the Reply to the BIO at 13-15 as to why the decision below, the assumptions in *Fritts*, and the government's arguments herein are wrong. On the rationale articulated in *Walton*, the "mere potential for some trivial pain or slight injury," such as that which existed (without actual injury) in both *Hayes v. State*, 780 So.2d 918 (Fla. 1st DCA 2011) and *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000), does not suffice for the ACCA's elements clause.

For that reason, neither a Florida robbery conviction nor an Alabama robbery conviction is an ACCA violent felony.

Respectfully submitted,

MICHAEL CARUSO
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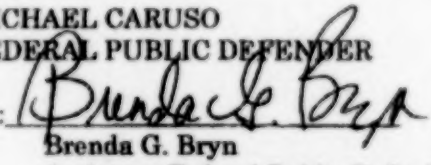
By: 

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NO: 17-5554

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
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FOURTH SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

CASES:

In re Welch,

___ F.3d ___, 2018 WL 1325013 (11th Cir. March 15, 2018) 1

United States v. Fritts,

841 F.3d 937 (11th Cir. 2016) 1

United States v. Walton,

881 F.3d 768 (9th Cir. Feb. 1, 2018) 1

STATUTORY AND OTHER AUTHORITY:

Supreme Court Rule 15.8 1

Ala. Code § 13A-8-41(a)(1) 1

Ala. Code § 13A-8-43(a)(1) 1

FOURTH SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioner Denard Stokeling wishes to alert the Court to the Eleventh Circuit Court of Appeals' recent decision in *In re Welch*, __ F.3d ___, 2018 WL 1325013 (11th Cir. March 15, 2018), holding definitively – and contrary to the Ninth Circuit in *United States v. Walton*, 881 F.3d 768 (9th Cir. Feb. 1, 2018) – that a conviction for Alabama first-degree robbery is categorically a violent felony within the ACCA's elements clause because it requires overcoming victim resistance.

In so holding, the Eleventh Circuit followed its precedent on Florida robbery, stating:

> [Mr. Welch's] prior conviction for Alabama first degree robbery qualifies as a predicate offense under the elements clause because it requires force with the intent to overcome physical resistance. *See* Ala. Code §§ 13A-8-41(a)(1), -43(a)(1) (providing that a person commits first degree robbery if in the "course of committing a theft he . . . [u]ses force against the person of the owner ... with intent to overcome his physical resistance or physical power of resistance" and is "armed with a deadly weapon or dangerous instrument" or "[c]auses serious physical injury to another"); *see also United States v. Fritts*, 841 F.3d 937, 941–42 (11th Cir. 2016) (concluding that a conviction under Florida's armed robbery statute qualifies as a violent felony under the ACCA's elements clause because the statute requires the "use or threatened use of physical force") (quotation marks omitted).

Id.

Welch confirms that, as argued in Petitioner's Third Supplemental Brief, the Eleventh Circuit treats Alabama robbery as analytically indistinguishable from Florida robbery; it deems force sufficient to overcome resistance to be categorically violent, contrary to the thrice-expressed view of the Ninth Circuit; and therefore, resolution of the circuit conflict on Florida robbery will have broad legal importance

and affect the status of convictions under other robbery statutes with similar "overcoming resistance" elements.

Respectfully submitted,

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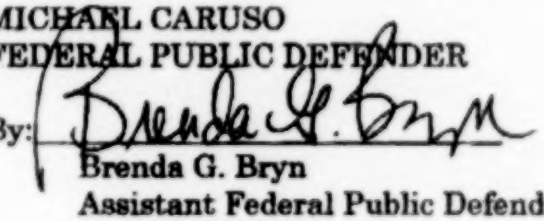
By: 

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March 19, 2018

No. 17-5554

In The Supreme Court of the United States

DENARD STOKELING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

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UNITED STATES,

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys and strives to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct

[1] All parties have consented to the filing of this brief. *See* Supreme Court Rule 37.3(a). No counsel for either party authored this brief in whole or in part, and no person or entity other than *Amicus* or its counsel made a monetary contribution to the brief's preparation or submission.

members; up to 40,000 counting affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. In keeping with this commitment, NACDL files numerous *amicus* briefs with this Court and has done so in other cases involving the proper interpretation and application of the Armed Career Criminal Act, including, for example, *Curtis Johnson v. United States*, 559 U.S. 133 (2010); *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015); and most recently *Mathis v. United States*, 136 S. Ct. 2243 (2016). By offering its perspective, NACDL seeks to assist in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A shoplifter in Tampa slips a lipstick in her pocket. As she makes her way to the door, a loss prevention officer yells "stop" and grabs her arm. She yanks her arm free and bolts out of the door. He catches up to her, and she is convicted of robbery because, in the lexicon of Florida courts, she used "force" at some point during the encounter—*i.e.*, yanking her arm out of the loss prevention officer's hand to overcome his "resistance" to her getaway.

This is no idle hypothetical; Florida decisions document robbery convictions on similar facts.

In yanking her arm away, the shoplifter exerted force in a Newtonian sense. But she did not use substantial, violent force as the text of the Armed Career Criminal Act (ACCA, or the Act) requires. And her crime was not the sort of violent robbery that Congress intended to single out when it adopted the Act to impose harsh mandatory minimum sentences on the Nation's most hardened repeat criminals. Although Congress anticipated that convictions for violent forms of robbery would qualify, Congress did not intend for ACCA's highly enhanced federal sentences to be based on garden-variety thefts.

It thus does not matter that one could imagine, as the government suggests, how a shoplifter using some slight force to overcome resistance—nudging a loss prevention officer out of the way while escaping, for example—might, under some set of circumstances, cause the loss prevention officer to suffer some slight injury. Causing a slight injury, like a bruise, does not necessarily involve violent force, which is what ACCA requires. What's more, Florida law does not require that the force involved in a robbery be capable of causing even that much harm; no element of Florida robbery mandates that the "force" exerted by the robber be capable of causing any injury whatsoever. Interpreting the Act to reach any crime that involves nominal "force," based on only the hypothetical risk of injury in sample cases, impermissibly expands the scope of the Act beyond its text.

As the Act now stands, its terms are clear. It applies only to state crimes that require strong,

substantial force, in every case. Florida robbery—encompassing a mere nudge from an escaping perpetrator—does not.

ARGUMENT

THE ARMED CAREER CRIMINAL ACT APPLIES ONLY TO VIOLENT ROBBERIES.

A. Because The Use Of Violent Force Is Not An Element Of Robbery Under Florida Law, Florida Robbery Is Not A "Violent Felony" Under ACCA.

The Armed Career Criminal Act imposes a highly elevated mandatory minimum sentence for unlawful firearm possession by a defendant who has been convicted of three violent felonies (or serious drug offenses, which were in Congress's judgment intrinsically intertwined with violent crime) at any time in his past. 18 U.S.C. § 924(e). Rather than the ordinary ten-year maximum sentence for unlawful firearm possession, a defendant with three prior "violent felony" convictions faces a sentence between fifteen years (the mandatory minimum) and life in prison. *Id.* § 924(a)(2), (e). Apart from four enumerated crimes (burglary, arson, extortion, or use of explosives), a conviction involves a "violent felony" only if the crime has "as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B)(i).

1. As this Court has explained, "force" in this context—a "statutory definition of 'violent felony'"—means "*violent* force." *Curtis Johnson v. United*

States, 559 U.S. 133, 140 (2010). This is the "ordinary meaning" of "physical force," which "normally connotes force strong enough to constitute 'power,'" and the connotation is even greater when the phrase "is contained in a definition of 'violent felony.'" *Id.* at 138, 142.

Under this ordinary, "clear" meaning of the statutory text, a crime must have an element requiring the use (or threat) of "strong," "substantial" "force capable of causing physical pain or injury to another person" to qualify as a violent felony. *Id.* at 140. A slap in the face causing pain may be sufficiently violent, *id.* at 143, but a squeeze of an arm causing a bruise likely is not, *United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014) (citing *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)).

Florida robbery does not require the type of "strong physical force" necessary for the crime to qualify as a "violent felony" under the plain meaning of the statutory text, *Curtis Johnson*, 559 U.S. at 140, for several reasons. *See* Pet'r Br. 26-41. For one thing, a tug or pull applied only to an object meets the "force" element for robbery under Florida law—even if the robber does not touch the victim at all. *See* Pet'r Br. 34-35 (describing case). That is not "strong," "substantial," "violent force" used "against the person of another" under any reasonable understanding of those terms.

What's more, even where the "force" in question does involve touching another person, the amount of "force" required for Florida robbery is calibrated to the level of resistance, so even minimal "force" is enough if the resistance is also minimal. *See* Pet'r Br. 31-32.

For decades, the Florida Supreme Court has emphasized that the "degree of force used is immaterial" to whether a theft qualifies as a robbery, because all "that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance." *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922); *see Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997) (stating the same rule); *see also* Pet'r Br. 28-31. Examples bear out the Florida Supreme Court's admonition that any "force" will do. *See* Pet'r Br. 33-36, 38-40 (describing examples involving opening a fist to grab cash, "rak[ing]" a victim's hand, and escaping the grasp of a bystander). These examples may involve force of a kind—like squeezing an arm hard enough to cause a bruise—but they fall far short of the "substantial degree of force" required by the ordinary meaning of the statutory text. *Curtis Johnson*, 559 U.S. at 140.

2. That Florida robbery can be committed by minimal force falling far short of the violent force specified by ACCA is reason enough to reverse the judgment below. The Court need examine no other aspect of the elements clause beyond the requirement of "physical force." *See* Pet'r Br. 18-26. But the rest of the clause buttresses this result. In *Amicus's* view, Florida robbery also fails to qualify as a "violent felony" because it does not require the purposeful "use" of violent force. 18 U.S.C. § 924(e)(2)(B)(i). "Use" of force cannot, of course, be "negligent or merely accidental." *Castleman*, 134 S. Ct. at 1414 n.8 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2007)). And the term "violent felony" itself connotes a *purposeful* use of force. *See Curtis Johnson*, 559 U.S. at 140 ("The ordinary meaning of ['crime of violence'] ... suggests a

category of violent, active crimes.") (quoting *Leocal*, 543 U.S. at 11); *cf. Begay v. United States*, 553 U.S. 137, 145 (2008) ("Crimes committed in such a purposeful, violent, and aggressive manner are ... characteristic of the armed career criminal, the eponym of the statute.") (citation and internal quotation marks omitted).[2]

Under Florida law, not only is the degree of "force" immaterial, but the act deemed to be "force" need not be purposeful or aggressive to support a robbery conviction. For example, a shoplifting is converted to a "robbery" under Florida law if the perpetrator nudges a security officer on the way out of the store, or simply pulls away when a bystander grabs his arm. *See Robinson*, 692 So. 2d at 886-87 & n.10 (noting that a 1903 case involving a pickpocket's attempt to escape from the grasp of a victim would qualify as robbery under current Florida law); *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. Dist. Ct. App. 1989) (shoplifter "pushing [an employee] out of the way as he bolted through the front door" constituted robbery). Although the Court need not resolve what

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[2] The Court has not resolved whether a crime requiring only the reckless use of force would qualify as a "violent felony" under ACCA. *Cf. Voisine v. United States*, 136 S. Ct. 2272, 2280 n.4 (2016) (reserving the question regarding "crime of violence" in 18 U.S.C. § 16). The Court's holding that recklessness satisfies the test for a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A), where (unlike ACCA) Congress intended to sweep in "garden-variety assault or battery misdemeanors," does not automatically carry over to the Act's definition of "violent felony," "in light of differences in [the statutes'] contexts and purposes," *id.* at 2280 & n.4 (discussing distinctions between § 921(a)(33)(A) and § 16).

mens rea qualifies as "use" of force to decide this case, Florida's acceptance of purported "force" that is both slight and wholly incidental and reactive underscores the vast distance between Florida robbery and the category of "violent, active crimes," *Curtis Johnson*, 559 U.S. at 140, encompassed by ACCA.

B. The Act's Legislative History, Like Its Text, Reflects Congress's Intent To Target Only Violent Robbery In ACCA.

Statutory text alone establishes that Congress did not intend to sweep the Nation's unlucky shoplifters and clumsy pickpockets into the "armed career criminal" category. *See Nixon v. United States*, 506 U.S. 224, 232 (1993) ("[T]he plain language of the enacted text is the best indicator of intent."). The Court need go no further, but examining legislative history only confirms the natural reading of the Act's text: Congress did not intend to sweep in any and every variety of robbery when it passed the Act, but rather was concerned with those robbery offenses that involve violence. "As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Begay*, 553 U.S. at 146. Congress's special concern for violent career criminals did not extend to robbery crimes, like Florida's, that often involve no violence at all.

1. In the statute's first incarnation, in 1984, ACCA applied only to prior convictions for robbery and burglary, and these enumerated crimes were explicitly defined in the statute. Congress was particularly concerned with those two crimes because they were

common and oft-repeated by a small subset of "career criminals." *See* H.R. Rep. No. 98-1073, at 3 (1984) (quoting Senator Spector's statement introducing companion bill as "succinctly describ[ing] the rationale" for the Act, including that "[r]obberies and burglaries occur with far greater frequency than other violent felonies" and a "high percentage of [them] are committed by a limited number of repeat offenders"). And robbery, as described in the legislative history, was marked by physical violence: As recited by Senator Spector, and endorsed by the House Committee Report, robberies "involve physical violence or the threat thereof" and often "result in physical injuries." *Id.* The evidence and statistics considered by Congress therefore focused on violent and armed robberies, with the Senate report on an earlier version of the 1984 law citing evidence that "nearly 75 percent of the robbery victims miss ... days of work" due to the robbery, "a large number of robbers use firearms," and the "typical offender" in one study "would have committed five armed robberies and seven burglaries" in the prior year. S. Rep. No. 98-190, at 4, 6 (1983).

The 1984 act's text confirmed its limitation to more serious robberies, consistent with Congress's intent "to combat violent and major crime." S. Rep. No. 98-190, at 1. As defined, "robbery" was a narrower crime than the version that exists under Florida law. *See* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, § 1803, 98 Stat. 2185, 2185. "Robbery" was defined as "the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected

to bodily injury." *Id.* Specifically, ACCA's predecessor statute required that violent force be used to effectuate the theft. *See id.* (requiring the "taking" to be done "by force or violence"). But Florida law has no such requirement, due to a statutory amendment departing from the common-law rule. *See* Pet'r Br. 27; *Rockmore v. State*, 140 So. 3d 979, 982 (Fla. 2014). In contrast to Congress's focus on violent robbery—*i.e.*, robbery where violence is intentionally used to forcibly take property—Florida law encompasses crimes where the theft is free of any force, and sweeps any getaway pulling or nudging into the crime of "robbery."

Congress's focus on more serious robberies involving purposeful force in the taking of property was consistent with Congress's intent for local prosecutors to refer only "their most hardened robbers and burglars for Federal prosecution," and not to sweep in low-level crimes. *Armed Career Criminal Act Amendments: Hearing on S. 2312 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary*, 99th Cong., 2d Sess., at 8 (1986) (hereafter "Senate Hearing") (testimony of James Knapp describing 1984 act).

2. The textual amendments made by Congress in 1986, as well as the legislative history surrounding those amendments, further confirm Congress's focus on violent robbery, even as Congress expanded the Act's reach to additional kinds of violent crimes (as well as serious drug offenses). *See* Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207-39.

The most important change made by Congress in 1986 was to replace the enumeration of burglary and

robbery with two definitions of "violent felony." The first, discussed above and commonly called the "elements clause," expanded the violent crimes covered by the Act to include any crime having an element requiring the use or threat of violent force against another person. 18 U.S.C. § 924(e)(2)(B)(i). The second definition enumerated four property crimes that qualified as violent felonies—burglary, arson, extortion, and the use of explosives—and added as a catch-all category any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another," *id.* § 924(e)(2)(B)(ii). This last clause, commonly called the "residual clause," has since been invalidated as unconstitutionally vague. *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015).

Significantly, and in contrast to burglary, Congress did not re-enumerate robbery as a predicate crime. So after the 1986 amendments, a robbery conviction did not qualify as a violent felony simply by mapping on to "generic," commonly understood robbery, as is the approach for burglary and the other enumerated crimes. *See Mathis v. United States*, 136 S. Ct. 2243, 2247-48 (2016). Of course, Congress still anticipated, and intended, that violent robbery would be covered by the Act—*i.e.*, those robbery offenses that, by their terms, satisfied the violent-force standard of the elements clause (or, before the residual clause was invalidated, those that "otherwise involve[d] conduct that presented a serious potential risk of physical injury to another"). But the deletion of robbery from the list of enumerated crimes cabined the range of robberies potentially qualifying as ACCA predicates, even as ACCA's reach was expanded to

other violent crimes—the primary purpose of the 1986 amendments, *Taylor v. United States*, 495 U.S. 574, 584 (1990). Had Congress believed that *all* robbery would necessarily satisfy the elements clause or residual clause, there would have been no reason for Congress to remove robbery from the list of crimes enumerated in the statute.[3]

Discussion of the 1986 amendments again showed how the kind of robbery Congress intended to target in the Act was dangerous, violent robbery involving substantial force. Committee reports on the bill that was ultimately enacted repeatedly referred to "robbery" in the same breath as highly violent crimes such as rape and murder. *See, e.g.*, H.R. Rep. No. 99-849, 99th Cong., 2d Sess., at 3 (1986) (describing the elements clause as "includ[ing] such felonies involving physical force against a person such as murder, rape, assault, robbery, etc."); *id.* at 4 (same). As in 1984, moreover, and consistent with the title of the Act, much of the information considered by Congress focused on "career criminals" that had committed *armed* robberies. *See, e.g.*, Senate Hearing, at 29 (ATF letter to Senator Specter, June 5, 1986) (describing same study cited in 1984 indicating that 100 typical offenders will have committed 490 armed robberies, 720 burglaries, and approximately 4,000 other serious crimes); *id.* at 19 (statement of Deputy Asst. Sec'y for

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[3] The invalidation of the residual clause, moreover, has further narrowed the range of robbery offenses that qualify as "violent crimes" under ACCA: while the residual clause might have applied so long as a robbery offense would *typically* involve violence, the elements clause applies only if the offense *always* involves violent force.

Enforcement, Bureau of Alcohol, Tobacco & Firearms, describing 1984 act as addressing the problem of "habitual armed robbers").

Finally, Congress's focus on violent robberies was consistent with the overall drive of the legislation: to target the most dangerous, most violent career criminals. The legislative history is replete with a focus on violence, not some incidental act that can be described as force only in the most basic, minimal physical sense. As described by the sponsor of a precursor bill to the enacted legislation, the expansion was designed "to be used against the most dangerous criminals." 132 Cong. Rec. 7697 (1986) (statement of Sen. Arlen Spector). Witnesses, too, described the conduct encompassed by the new definitions as "violent in nature and dangerous." Senate Hearing, at 17 (testimony of Joseph DiGenova, U.S. Attorney for Washington, D.C.). At the same time, the sponsors of the legislation sought to ensure that Congress did not "open up a situation where just garden variety local crimes and property matters end up in the Federal courts." *Armed Career Criminal Legislation: Hearing on H. R. 4639 and H. R. 4768 before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess., at 12 (1986) (testimony of precursor bill sponsor Rep. Ron Wyden). Shoplifting and pickpocketing—even if accompanied by a slight tussle during the getaway—are garden variety local crimes, not dangerous, violent felonies. They are not the sort of crimes "typically committed by those whom one normally labels 'armed career criminals.'" *Begay*, 553 U.S. at 146.

C. The Government's Proposed Focus On Whether The Facts Of Particular Cases Present Some Potential Risk Of Slight Injury Would Impermissibly Expand The Reach Of The Elements Clause Beyond Its Text.

To avoid the plain import of the "clear," "ordinary meaning" of "physical force"—that an element of robbery require a "substantial degree of force," *Curtis Johnson*, 559 U.S. at 140—the government's Brief in Opposition (BIO 11-13) attempts to shift the inquiry under the elements clause from the degree of force Florida law requires in every case (minimal) to the injury that might conceivably result from the conduct involved in a handful of cases. Relying on one sentence—and, arguably, one word—from *Curtis Johnson* (and nothing from the text of the statute), *see* Pet'r Br. 22-25, the government argues that Florida robberies are often accompanied by a risk of injury, so Florida law *must* require that the force used in *any* robbery be force that is "capable of causing physical pain or injury to another person," *Curtis Johnson*, 559 U.S. at 140.

There are at least two problems with that approach. First, the government assumes that identifying any risk of injury (however remote the risk and however slight the potential injury) is enough to show that violent force is involved. But violent force requires more, as the Court recognized in *Castleman*. Second, the government's approach wrongly equates a hypothetical risk of injury drawn from the facts of a few cases with a state-law element requiring that the robber use substantial force capable of injury in *every*

case. That approach is counter to ACCA's text. And it would also effectively (and impermissibly) expands the reach of the elements clause to include crimes that might have qualified under the now-invalidated residual clause, but do not meet the elements test, which focuses on the least-culpable conduct encompassed by an offense.

1. Even if assessing the level of risk presented by the typical case were an otherwise acceptable approach to the elements clause (it is not, as described below), the cases demonstrate that the level of risk presented by Florida robbery often falls far below what might correspond to a violent-force element, as Petitioner explains. A person can commit Florida robbery by pulling bills from another person's hand, without touching the other person at all. *See* Pet'r Br. 34 (describing case). The victim in such a case could suffer a paper cut, perhaps—but a paper cut is not the type of actual or potential injury that might indicate violent force. *See Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003) (describing battery examples, including causing a "paper cut," and noting "[i]t is hard to describe any of this as 'violence'") (cited with approval in *Curtis Johnson*, 559 U.S. at 140). Given that force capable of causing slight or nominal injury (like a bruise) is not violent, *Castleman*, 134 S. Ct. at 1412, the government cannot be right (*see* BIO 12) that the mere *risk* of such slight injury satisfies ACCA's violent-force requirement.

2. The elements clause cannot be satisfied simply by hypothesizing a typical risk of harm from the facts of a few robbery convictions in any event. Florida law does not *require* that the "force" used in a robbery be

capable of causing injury in every case—much less that the force be reasonably expected to cause pain or injury, as would be required for it to be substantial, violent force, *see* Pet'r Br. 23-24. In fact, in many of the Florida cases cited by Petitioner, there was no injury at all. *See* Pet'r Br. 33-36. That is because whether the "force" was strong enough to cause any sort of pain or injury is not a factor or test applied by the Florida courts to determine if the elements of robbery are satisfied. *See* Pet'r Br. 28-31. Rather, Florida courts have consistently recognized that the degree of force is "immaterial" to the offense. *E.g.*, *Montsdoca*, 93 So. at 159.

ACCA's statutory structure illustrates how the government's approach wrongly diverges from the elements clause's focus on the state crime's legal requirements. Before Congress adopted the 1986 amendments to ACCA, it considered two different bills, one of which would have limited the "violent felony" definition to convictions satisfying the elements test. *See Taylor*, 495 U.S. at 582-83. The narrower bill was criticized for "excluding property crimes" that might "present a serious risk of harm to persons." *Id.* at 584-87.

The compromise bill therefore included property crimes that posed an inherent serious risk of physical injury, even though they did not (unlike the crimes covered by the elements clause) require as an element "violence against persons." *Id.* at 587-88. Four specific such crimes were enumerated: burglary, arson, extortion, and use of explosives. Others were covered by the "residual clause," capturing crimes that "otherwise involve[d] conduct that presented a serious

potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The residual clause thus required courts to speculate about conduct and risk, asking them to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Samuel Johnson*, 135 S. Ct. at 2557. The elements clause, in contrast, looks only to the minimum legal requirements for the crime within its elements. *See id.*

The residual clause is no more, but Congress's intent in crafting the elements clause remains. That intent—reflected in the ordinary meaning of the text—is to capture only those crimes that legally require the perpetrator to use strong, substantial force capable of causing injury, *see Curtis Johnson*, 559 U.S. at 140—not those crimes that might only sometimes (or even typically), by their conduct, involve such force. And Florida robbery does not expressly require such force. The test is "any degree of force" capable of overcoming any "resistance," Pet'r Br. 28-31 (examining cases); the capacity to cause injury is not a required factor. Nor can the "overcoming resistance" element be satisfied *only* by injury-capable force—as the conviction based on pulling bills from a closed fist (among others, *see* Pet'r Br. 33-35) demonstrates.

Rather than focus on the least culpable conduct criminalized by state law, *see Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013), the government would have the Court hypothesize the maximal amount of risk of injury that could be produced by some hypothetical chain of events arising out of the facts of a particular case—for example, a push could maybe cause a fall

which could maybe cause an injury (even if it did not, BIO 12-13)—and assume that state law must require the creation of such risk as an element of the crime. But this is inconsistent with the elements clause's focus on the least-culpable state-law floor and strikingly reminiscent of the analysis used by courts under the residual clause to capture robberies that did not satisfy the elements clause. *See, e.g.*, *United States v. Welch*, 683 F.3d 1304, 1313 (11th Cir. 2012) (holding that although robbery by snatching might not involve the use of force as an element, it involved a serious risk of physical injury because the victim could fall from trying to hold on to her property, thereby suffering injury).

Such conjectural analysis has no place in the elements clause, which focuses not on what risk of injury might arise from some combination of the victim's characteristics, the perpetrator's conduct, and the circumstances of the crime in a hypothetical case, but on what degree of force the perpetrator is required to use, in every manifestation of the offense, to satisfy the elements of the state crime.

Where Congress has been clear—as it has in the elements clause, *Curtis Johnson*, 559 U.S. at 140—the Court should not allow modes of analysis from the now-invalidated residual clause to expand upon the elements-clause definition. Ultimately, if Congress is concerned that ACCA sweeps too narrowly with respect to robbery, it has a host of choices. It could, for example, enumerate robbery (thereby including all "generic" robberies), define a robbery crime that would qualify (as it did in 1984), or (following the model of 8 U.S.C. § 1101(a)(43) for aggravated felonies), provide

a list of federal statutes that would qualify as violent felonies and include state analogues.

But, for now, the statute in its present form is clear and must be applied according to its plain terms: only a robbery that requires, as an element, the use of substantial, purposeful, violent force qualifies to make someone an "armed career criminal." Florida law, which deems any theft a robbery if the perpetrator so much as nudges a bystander in their haste to flee, does not require such force. It is therefore not a violent felony under ACCA.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

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June 18, 2018